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ASYLUM IN LEGATIONS AND CONSULATES AND IN VESSELS. I.

I. *The Right of Asylum.*

NO legal term in common use is perhaps so lacking in uniformity and accuracy of definition as the "right of asylum." The word asylum has in its legal relations become to a great extent metaphorical. In its original sense it was highly descriptive. It was applied to privileged places, devoted to special uses, among which was that of shelter for the fugitive. These places were by positive law or by superstition protected from invasion, and in reality they formed sanctuaries. If the fugitive could reach one of them, he was safe from pursuit. He had clothed himself with a right to protection which could not be violated. It was the right of asylum.

This right was the natural product of the conditions under which it arose. The inspiration of the ancient criminal law was the principle of vengeance. Whether pronounced by the head of a family or of a tribe, sitting in judgment upon an injury inflicted on one of its members, or by a priest, as the mouthpiece of an offended deity, the sentence was imposed as an act of revenge. The right of private vengeance was fully recognized. "Whoso sheddeth man's blood, by man shall his blood be shed," was a law that imported at once the expiatory character of punishment and the righteousness of individual retaliation. The slayer was pursued by the avenger of blood, and if overtaken was summarily killed. It is not strange that under systems based so entirely upon the *lex talionis*, sentiments of religion and humanity, as well as of justice, should have suggested means of escape from undiscriminating violence. Hunted by the

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avenger, the transgressor, as a fugitive and a suppliant, found shelter at the foot of the altar, and oftentimes obtained there remission of his sin. But even if he was not permitted by an act of sacrifice or of supplication to atone for his offence, he was at least entitled to the benefit of mitigating circumstances and to an opportunity to establish their existence. These various motives prompted the institution of places of refuge. From temples of the gods and other places which it was sacrilege to violate, the right of asylum as an obstacle to violence was extended to cities, islands and other portions of territory.[1] It existed in Egypt, in Greece and indeed in all the ancient world. In these places of refuge the foreigner was received as well as the native. "These six cities," reads the law given to the Levites, "shall be a refuge, both for the children of Israel and for the stranger and for the sojourner among them: that every one that killeth any person unawares may flee thither."[2]

As superstition declined and private vengeance was displaced by the regulated action of judicial tribunals, these places of refuge ceased to exist; but all the ideas with which the practice of asylum was identified did not perish with them. From having been so long accorded, hospitality and protection had come to be regarded as the fugitive's privilege, and in the end each separate state became a refuge for offenders against the laws of other nations.[3] But the term right of asylum, though still used in this relation, gradually lost its ancient fitness. As the administration of justice improved, and the distrust of foreigners abated through familiarity of intercourse and the perception of common social interests, nations came to understand their rights and duties better, and the notion that protection was a right belonging to the fugitive disappeared. In its place was established the right of the state either to extradite or to expel any offender who comes within its jurisdiction.[4] In this relation the so-called right of asylum is simply the right of the government either to

[1] Bernard de l'Extradition, vol. i, p. 11.

[2] Numbers xxxv, 15.

[3] Moore on Extradition, vol. i, § 5.

[4] This right has been affirmed in the United States by the highest judicial authority. Ker *vs.* Illinois, 119 U. S. 436; *In re* Angelo de Giacomo, 12 Blatchford, 391. See, generally, Moore on Extradition, vol. i, §§ 86, 203.

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grant or to withhold the privilege of residence within its territories. But this right is to be exercised by the government in the light of its own interests, and of its obligations as a representative of social order. The right, therefore, is coupled with the duty, amply acknowledged by the multiplication of extradition treaties, to abstain from asserting the sovereign power for the purpose of shielding individuals charged with crime from trial by the competent judicial authorities. The right of sovereignty is conserved in determining the conditions and limitations under which the fugitive is to be delivered up.

When we speak of the right of asylum in respect to legations and consulates and to vessels, we have an admixture of ideas old and new. On the one hand, we are confronted with the ancient question as to the protection of the fugitive; on the other hand, instead of dealing with early superstitions, we are required to find a basis for such protection in the rights and immunities guaranteed by international law. In considering these topics, I shall first discuss the subject of asylum in legations and consulates.

In joining legations and consulates in the discussion it is not intended to imply that consulates are commonly invested with the immunities which attach to the residence of a diplomatic officer. Since the immunities of legations are, as will hereafter be maintained, intended to secure the personal independence of public ministers, they do not ordinarily belong to the offices of consuls, who, by the principles of international law, are not exempt from the local jurisdiction. As illustrations of this distinction, I may refer to the consular convention between the United States and New Granada of 1850, the fifth article of which provides that consuls shall not enjoy in either country the immunities granted to public agents accredited in a diplomatic character. They may exercise certain special privileges, such as placing the arms of their country or other insignia of office over the consular door; "but," it is further stipulated,

> those insignia shall not be considered as importing a right of asylum, nor as placing the house or its inhabitants beyond the authority of the magistrates who may think proper to search them.

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To the same effect is the fourth article of the consular convention of 1885 between the United States and the Netherlands; and article 5 of the convention of May 23, 1878, between the same countries stipulates for the inviolability of the consular archives, but not for that of the dwelling or office. By the thirty-fifth article of the treaty between the United States and Salvador of December 6, 1870, it is declared that

> the contracting republics recognize no diplomatic character in consuls, for which reason they will not enjoy in either country the immunities granted to public ministers accredited in that character.

Nevertheless, consuls, as the representatives of foreign governments, are entitled to special respect and consideration. In some instances they are clothed with a diplomatic character, and are then entitled to diplomatic privileges. In countries where they exercise judicial power, as in barbarous or certain non-Christian lands, they are regarded as endowing with extraterritoriality the place where their flag is planted.[1] Not infrequently consular offices are made inviolable by express agreement. The treaty with the German Empire of December 11, 1871, stipulates that the local authorities shall not on any pretext invade the consular office or dwelling, "except in the case of the pursuit of crime." By the second article of the treaty between the United States and France of November 14, 1788, it was provided that "they [consuls] shall place over the outward door of their house the arms of their sovereign," which according to former usage imported inviolability. By the third article of the treaty between the same countries of February 23, 1853, it is stipulated that "consular offices and dwellings shall be inviolable. The local authorities shall not invade them under any pretext." The same stipulation is found in the treaties of the United States with Belgium of December 5, 1868, and March 9, 1880; with Italy, of February 8, 1868, and May 8, 1878; with Rumania, of June 17, 1881; and with Servia, of October 14, 1881. It is true that in every one of these instances of specific agree-

[1] Wharton's Commentaries on Law, § 170; Lawrence's Wheaton, 73, 74; 7 Opinions of the Attorneys-General, 342, 495; 8 *ibid.* 380.

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ment, there is a stipulation, immediately following those just quoted, that "in no case shall those offices or dwellings be used as places of asylum." A distinction is thus clearly marked between the inviolability of the office or dwelling, and its use as a shelter for fugitives from justice. But this distinction is not peculiar to consulates. It merely signifies that the principle of inviolability is not without its limitations and is not incapable of abuse. By the seventh article of the treaty between the United States and Persia of December 13, 1856, it is provided that "the diplomatic agent or consuls of the United States shall not protect, secretly or publicly, the subjects of the Persian government." It is also a fact that in countries in which asylum under foreign flags is practised, consulates are sometimes used for that purpose, though not so frequently as legations. Without, therefore, intending to predicate diplomatic immunities of the consular office or dwelling, it has been thought proper to include even exceptional cases of asylum by referring to consulates as well as to legations; although, in the discussion of the principles that govern the subject, the argument will be confined to the privileges of diplomatic agents and the immunities of their offices or dwellings.

II. *Early Diplomatic Privileges and their Decadence.*

There is every reason to believe that soon after the establishment of permanent embassies in the fifteenth century, the dwellings of public ministers became resorts for persons fleeing either from violence or from legal prosecution. The abolition of cities of refuge and the decline of reverence for sacred places having left the fugitive without a sanctuary, he naturally sought shelter under the immunities of the public minister. At one time those immunities attained the most exaggerated proportions. They included not only the extraterritoriality of the minister and his suite, but also that of his dwelling or hotel, and of other buildings over which he placed the arms of his sovereign.[1] In some instances ambassadors of a thrifty

[1] Embassies and Foreign Courts (London, 1885), 336; Martens, Guide Diplomatique, §§ 33, 34.

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turn realized enormous profits by hiring and granting their protection to houses which they then sublet to malefactors.[1] In various places, as at Madrid, Venice and Rome, there existed what was known as the freedom of the ward or quarter (*franchise des quartiers*, as it was commonly called), by which the immunity attaching to the minister's house was extended to the quarter of the city in which the house was situated. At Frankfort-on-the-Main, where foreigners were not permitted to stay during the election and coronation of the Emperor, it was customary at such times for ambassadors, by placing the arms of their sovereigns in conspicuous places, to take under their protection, as temporary resorts, whole districts, which were in that manner exempted from the jurisdiction of the local authorities and even from taxes.[2] Not only were officers of justice excluded from the exercise of their functions within the privileged quarters, but it also appears that in some places the ambassador's permission was requisite in order that such officers might even traverse these quarters bearing the badges of their authority. Thus in 1680 the Marquis de Villars, ambassador of France at Madrid, demanded and obtained satisfaction from the Spanish government because the mayor of the city, accompanied by his bailiffs, traversed his quarter without permission. The government, however, did not yield to the ambassador's demand without a protest, since nine years previously, in 1671, the King of Spain had declared that he was resolved to treat the ambassadors of each prince as those of Spain were treated at such prince's court; and no freedom of the ward was accorded in Paris.[3] In 1684 the Spanish government notified all the ambassadors that for the future the exclusion of the local jurisdiction should apply only to their houses.[4]

The immunity allowed to the ambassador's house and the quarter in which it was situated was also extended to his carriage. In 1655 the Marquis de Fontenay, French ambassador at Rome, granted asylum to certain Neapolitan exiles and

[1] Lorimer's Institutes, 250. [2] Embassies and Foreign Courts, 337.
[3] Martens, Causes Célèbres (ed. of 1858), vol. i, p. 340.
[4] Wildman's Int. Law, 127 *et seq.*; Bynkershoek, Foro Legatorum, xxi.

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rebels; but, being unwilling to incur the expense of keeping them, he sought to send them back to Naples by water. As they were proceeding in the coach of the ambassador to the place of embarkation, seventeen of them were captured by the Pope's guard and taken to prison. The ambassador had an audience of the Pope, and demanded the release of the captives and reparation for the affront. In the prolonged controversy that followed, the Pope complained of the protection granted by the ambassador to profligates and whatsoever was criminal in the Ecclesiastical State, and contended that the privileges of ambassadors ought not to extend so far. The ambassador answered that it did not appear that he had harbored any of the Pope's subjects, but only some Neapolitans whom he might lawfully protect against the persecutions of the Spaniards. It was finally agreed that the Pope should release those whom the ambassador should name, and that the Papal nuncio at Paris "should regulate with the King the reparation the ambassador demanded *on account of the violence that had been done to his coach.*" Here, as Wicquefort says,

> all the advantage was on the ambassador's side; since the Pope, by surrendering the prisoners, tacitly owned he had done better not to have arrested them, and that he had made a noise for nothing.[1]

The gross abuse of the freedom of the quarter as a shelter for criminals of all descriptions, resulted in attempts to abolish it. The effort of the King of Spain to suppress it has already been referred to. In the latter part of the seventeenth century Pope Innocent XI resolved not to receive any ambassador who would not renounce the privilege.[2] In consequence it was given up by the Polish ambassador in 1680, by the Spanish in 1682 and by the English in 1686.[3] Early in the year 1687, the Duc d'Estrées, ambassador of France, having died, the Pope, before another minister was sent, occupied the Farnese palace, which was the seat of the French embassy, proclaimed the abolition

[1] Wicquefort's Embassador, Digby's ed., 272.
[2] Martin, Histoire de France, vol. ix, p. 78.
[3] Embassies and Foreign Courts, 337.

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of the freedom of the quarter and gave the French court notice of the fact, as well as of the renunciation of the privilege by other powers. Louis XIV, however, then King of France, announced with his customary arrogance that his crown should never be ruled by the example of others; that God had established it for an example and guide to others, and that he had resolved, so long as he reigned, never to let it be deprived of any of its rights. Accordingly he sent another ambassador, Lavardin, with an armed force of seven hundred men to maintain the privilege. The Pope answered him by a bull of excommunication and the quarrel continued till 1693, when it was adjusted by a compromise.[1]

Notwithstanding its unreasonable character and pernicious effects, the *franchise des quartiers* seems to have survived for a long time in spite of the efforts to suppress it. In 1759, the French minister at Genoa would not permit the local police to pass his hotel;[2] and as late as 1822 it was stated that at Rome certain legations, as those of France and Spain, still enjoyed a certain freedom of the quarter, which was carried so far that the Spanish ambassador would not permit police supervision in the neighborhood of his legation, except by guards attached to the mission.[3]

How, it may be asked, did such an exaggerated privilege come to prevail? The causes are manifold. It must be remembered that in the times when the privilege arose, the idea of territorial sovereignty — of the absolute jurisdiction of the state within its dominions — had not been fully realized. During a large part of what we usually term modern history sovereignty was not associated with dominion over the earth.[4] Even the feudal system, which linked personal duties to the ownership of land, did not establish this association, though it may have contributed to its growth. But with the successful termination of the long struggle against the idea of universal dominion and with

[1] Martens, Causes Célèbres, vol. i, p. 343 *et seq.*
[2] Embassies and Foreign Courts, 336 *et seq.*
[3] Martens, Manuel Diplomatique, § 30.
[4] Maine, Ancient Law, 103.

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the limitation of peoples to definite regions, the conception of territorial sovereignty and exclusive jurisdiction was gradually wrought out. The incompleteness of its realization in times comparatively recent is abundantly shown by various international conventions in which states have imposed servitudes upon their territories. Thus by the Treaty of Utrecht of 1713, fishing rights were reserved to French subjects in territory ceded under that convention by France to England; and by the treaty of peace between the United States and Great Britain of 1783, following the precedent set by the Treaty of Utrecht, similar rights were secured to American fishermen in British territory. As a further result of the imperfect conception of territorial sovereignty, we find jurisdiction parcelled out into various hands. Besides the courts under the control of the sovereign prince, there were tribunals administered independently by lesser authorities and by ecclesiastics. These administrators of law, with the symbols of their authority in their coats of arms, which they placed above the doors of their palaces, shared with the monarch the exercise of jurisdiction. Even in insular England there were civil courts and ecclesiastical tribunals that subtracted something from the supremacy of the general law of the land.[1]

That the imperfect conception of the state's supreme and exclusive jurisdiction bears a causal relationship to the enjoyment of inordinate privileges by diplomatic agents, is more than probable. If the freedom of the quarter ever existed in Paris, writers on that subject fail to disclose the fact; and it was in France that the power of the national government was first and most completely established over the ruins of mediæval privilege. The authority of the crown scarcely surpassed that of the parliament of Paris, with its politico-legal functions, and along with the growth of royal power there was developed a systematic jurisprudence, displacing the prerogatives of the nobles and the ecclesiastics.[2] But in the general absence of a conviction of the absolute sovereignty of the state within its dominions, it was an easy thing for persons endowed with exceptional immunities to

[1] Blackstone's Comm., book 1, *117; book 3, *63.
[2] Hallam, Middle Ages, vol. i, p. 242 *et seq.*

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exclude the exercise of local jurisdiction; and it is a remarkable fact that when the inordinate privileges of ambassadors came to be a subject of complaint, the ground of objection was not so much that they infringed upon the rightful authority of the government, as that their exercise had fostered an abuse that menaced the public safety. As the representative of a sovereign prince or of the sovereign pontiff, the ambassador or nuncio bore a character at once privileged and inviolable.[1] The coat of arms of his sovereign, which he placed above the portal of his dwelling,[2] not only guaranteed him freedom from molestation, but also imported authority. It was held that the ambassador had a right "to do justice in his own house upon those who depend on him."[3] In 1603 the Marquis de Rosny, afterward known as the Duc de Sully, who was sent by Henry IV to England as special ambassador to compliment James I on his accession to the throne, condemned one of his suite to death for killing an Englishman in a brawl, and invited the mayor of London to send officers to execute the sentence. The mayor took charge of the culprit and was preparing for his execution, when the Comte de Beaumont-Harley, ordinary ambassador of France, who opposed the sentence, procured a pardon from James and gave the offender his freedom. But while Henry IV, desiring not to mar the prevalent good feeling, took no action in the matter, his council and all France condemned the irregularity of the ordinary ambassador's procedure. Nor is it at all likely that James would have ventured to interfere, if the culprit had not previously been delivered into the custody of an English magistrate.

[1] "It is on this account," says Wicquefort, "that in several courts of Europe the embassadors set up the arms of their master over the gate of their palace; and almost everywhere they have a chair of state, which denotes the presence of the master of the house. At the Congress of Westphalia, the houses of the embassadors and plenipotentiaries were known by the arms of the sovereign whom they represented; not only those of crowned heads, of republics and of the electors, but also those of the princes of Germany and Italy. The embassadors of the United Provinces, writing to the States General, do not fail to date their letters: "From the House of their High Mightinesses," not so much because they defray the expense of the embassy and pay the rent of the house, as chiefly because it is their representative that lodges there."

[2] Martens, Guide Diplomatique (Paris, 1866), § 29, note; Wicquefort, 266.

[3] Wicquefort, 269.

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As has been observed, the first opposition to exaggerated ambassadorial pretensions was occasioned by their abuse. While evidence of this fact is found in the controversy between the Pope and the Marquis de Fontenay, which has already been narrated, further confirmation of it is afforded by a case that occurred still earlier. In 1540 the Venetian republic sent an ambassador to Constantinople to conclude a peace. The Porte, having discovered what the envoy was authorized to concede, made large demands, a considerable part of which were secured. Subsequently it was found that the ambassador's instructions had been betrayed to the Porte by certain Venetian officials who were in the pay of France. On learning that they had been detected, these officials fled to the palace of the French ambassador, who granted them asylum. The Council of Ten, however, of whom one of the culprits was secretary, holding that there was no asylum for high treason, demanded their surrender and, being unable to obtain it, planted two pieces of cannon before the ambassador's palace and compelled their delivery by force. Francis I, then King of France, when he heard of this transaction, was so incensed that he refused for two months to give audience to the Venetian ambassador. When at last an audience was granted and the King asked the ambassador what he would do if he were treated as had been the ambassador of France, the Venetian replied: "Sire, if rebellious subjects of your Majesty had sought refuge in my house, I would have delivered them up to the judges; and if I had done otherwise, I should have been severely punished by my republic." The pertinency of this answer was, under the circumstances, so complete that the King was pacified.[1]

The opposition to exaggerated privileges which grew out of their abuse, was strengthened and endowed with purpose by the growth of the idea of territorial sovereignty and the coincident development of a regular and orderly administration of justice, based upon law. This movement is marked by the advent of the publicists, — those learned and philosophical writers on the

[1] Martens, Causes Célèbres, vol. i, causes diverses, § 1; Blackwood's Magazine, vol. cxvi, p. 349.

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laws of nature and of nations, who endeavored to reduce the intercourse of states to a system founded upon absolute independence and equality. Of these, Grotius, though not the first, is conceded to be the foremost, example. His famous work, *De Jure Belli et Pacis*, published in 1625, is generally regarded as laying the foundation of the modern science of international law, and, if for no other cause, would be entitled to that distinction by virtue of the influence it has exerted. Grotius, arguing upon the reason of the matter, declared that whether the ambassador had jurisdiction over his family and suite, or whether his house was to be an asylum for all who took refuge there, depended upon the concession of the sovereign near whom he resided, since it was not a part of the law of nations.[1] A century later, in 1721, Cornelius von Bynkershoek issued his great treatise, *De Foro Legatorum tam in Causa Civili quam Criminali*, a masterly exposition of the rights of legation, in which he declared that the privilege of asylum was so preposterous that Quintilian himself could not give color to it.[2] The privileges which the law of nations conferred upon ambassadors were, he maintained, founded upon the necessity of protecting them in the exercise of their functions, — an end to the attainment of which the obstruction of justice by granting an asylum to criminals was in nowise requisite; and he cited with approval a demand made by the States General for the surrender of an offender who had taken refuge in the house of the English resident.

It should be remembered, however, that these publicists, while their argument goes further, spoke in the presence of the gross abuses which have already been described; and although the justice of the complaint against those abuses was acknowledged, as shown by the partial abatement of the freedom of the quarter and its associated pretensions, nations did not readily abandon the claim of asylum, which in the general estimation was

[1] Ipse autem legatus an jurisdictionem habeat in familiam suam, et an jus asyli in domo sua pro quibusvis eo confugientibus, ex concessione pendet ejus apud quem agit. Istud enim juris gentium non est. Grotius, II, 18, viii.

[2] Chap. xxi; cited by Wildman, Int. Law, § 127, and many other publicists.

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identified with the immunity belonging to the ambassadorial residence. In the year 1726, the famous Duke of Ripperda, minister of finance and foreign affairs to Philip V of Spain, becoming distrustful of his security, fled to the house of the British ambassador at Madrid and disclosed to him the secrets of the Spanish cabinet in respect to negotiations with Austria in which the interests of England were adverse to those of Spain. The Spanish government demanded the fugitive's surrender, alleging that he had in his possession important state papers; but in vain. The government then referred the matter to the council of Castile, which decided that he might be taken by force, since it would

> operate to the subversion and utter ruin [of sovereigns], if persons who had been intrusted with the finances, the power and the secrets of the state, were, when guilty of violating the duties of their office, allowed to take shelter under a privilege which had been granted to the houses of ambassadors in favor of only ordinary offenders.[1]

In accordance with this view, the duke was taken from the house, the ambassador submitting to avoid disturbance. The relations between England and Spain were already exceedingly strained, and the seizure of Ripperda, though not the cause of the ensuing hostilities, was deeply resented in England. Vattel, who has been more widely read and quoted than any other writer on the law of nations, affirms, in respect to the opinion of the council of Castile, that "nothing could be said on this topic with greater truth and judgment"; and Phillimore declares "that Spain was not guilty of any violation of international law." It may, indeed, well be admitted that the claim of the British ambassador to protect a traitor and at the same moment to reap the fruits of his treason was most unconscionable.

In 1747 a merchant named Springer, a native of Russia domiciled in Stockholm, was convicted before a special commission as an accomplice in the crime of high treason. On the evening of the day on which he was to have been sentenced, he escaped

[1] Vattel, 494 *et seq.*; Martens, Causes Célèbres, vol. i, cause vi; Phillimore, vol. ii, cciv; *London Law Magazine and Review*, Nov. 1891, p. 93.

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from prison in disguise and on pretence of being an English courier gained admission to the hotel of the English ambassador, Colonel Guideckens. On the refusal of the ambassador to surrender him, the Swedish government surrounded the hotel with troops, searched all who entered it and caused the minister's carriage to be followed by a guard. In consequence, Guideckens surrendered the culprit under protest, but subsequently, under instructions of his government, demanded redress. Failing to obtain it, he left Stockholm suddenly, by order of his king, without taking formal leave; and as the Swedish government responded by ordering its ambassador away from London in the same manner, diplomatic relations were for the time suspended.[1]

III. *Survivals of Asylum in Europe.*

By too readily inferring that the views of Grotius and Bynkershoek were immediately admitted in the practice of states and that the more recent cases of invasion of diplomatic asylum to which I have adverted mark its termination, many writers have been led to assert in terms too sweeping and absolute that the right to grant such asylum has long since ceased to be recognized in European countries.[2] It has, indeed, ceased to be the rule; but there seems to be ample evidence that its decline was slow and not infrequently interrupted. Vattel, who was a diplomatist as well as a publicist, doubtless wrote in reference to existing practices; and in his great treatise, published in 1758,

[1] Martens, Causes Célèbres, vol. ii, cause iv. Phillimore, vol. ii, ccv, says: "It seems clear that the conduct of Sweden was in accordance with the principles of international law."

[2] The following are examples: "In modern times the ambassadorial right of asylum, which gave rise to so many abuses, is abolished in all European states." Embassies and Foreign Courts (1855), 398. At the same time the author adds: "A difference is, however, made between offences against the state and private crimes." Hall, Int. Law, 3d ed., 1890, says: "In Europe, however, it has been completely established that the house of a diplomatic agent gives no protection either to ordinary criminals or to persons accused of crimes against the state." But he adds in a footnote that asylum was "revived" in Spain "for a considerable time." Woolsey, Int. Law, 6th ed., § 92, p. 138, goes still further, and says that "the usage, if we are not deceived, was never general throughout Europe, and even where it obtained, as in Rome and Madrid, was sometimes opposed and violated by the government."

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while inveighing against a minister's taking advantage of his immunities in order "to afford shelter and protection to the enemies of the prince and to malefactors of every kind, and thus screen them from the punishment they have deserved," he said:

> I grant, indeed, that when there is question only of certain ordinary transgressions, and these committed by persons who often prove to be rather unfortunate than criminal, or whose punishment is of no great importance to the peace of society, the house of an ambassador may well serve as an asylum for such offenders; and it is better that the sovereign should suffer them to escape, than expose the ambassador to frequent molestation under pretense of a search after them, and thus involve the state in any difficulty which might arise from such proceedings.[1]

G. F. de Martens, the eminent German publicist and councillor, in his *Précis*, published in Göttingen in 1789, and republished there in 1821, the year of his death, declared (§ 4) that asylum was still allowed for private crimes, though it was universally admitted that persons accused of crimes of state might be seized, if not given up.[2] It was not till 1815 that asylum was abolished at Rome, and then an exception was made as to persons charged with misdemeanors.[3]

That the decline of asylum was gradual, is not strange. Diplomacy is always tenacious of its privileges. But apart from this fact, the recurrence of conditions resembling those in which the practice of asylum earlier found its justification has occasioned its revival at certain times and places, for the purpose of shielding fugitives from naked violence. In even a broader form than this it has appeared in Europe in the last half-century, though neither public opinion nor diplomatic usage would now tolerate its systematic employment, as in former times, for the purpose of obstructing the course of justice or of fostering political conspiracies.

In the revolution in Greece in 1862, a refuge was granted both in legations and in consulates to those in danger of

[1] Also cited by Félice, Leçons (1830), vol. ii, p. 560 *et seq.*
[2] Also cited by Polson, Law of Nations, § 32.
[3] Wildman, International Law, § 127 *et seq.*

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their lives.[1] During the persecution of the Jews in Moldavia, Wallachia and Servia in 1867, under cover of the laws relating to vagabondage, the British consul at Golatz made it known that in case of need a refuge could be found in the British consulate.[2] It is true that both Greece and the Danubian principalities were more or less under foreign tutelage, though surely not so far as to enable foreign powers to control the authorities. But it is in Spain that the practice of asylum in Europe has been most recent and most extensive. For more than a decade prior to 1850 the country was in a chronic state of revolution. In 1841 the Chevalier d'Alborgo, *chargé d'affaires* of Denmark in Madrid, received into his dwelling the principal persons who had been engaged in a conspiracy to seize the Queen in her palace and overturn the government of General Espartero. In 1843 the Marquis of Casa Irujo, afterward Duke of Sotomayor, who had fallen into disfavor, found shelter under the roof of the same diplomatist; as also did Señor Salamanca, who, it has been alleged, corresponded from his asylum with General Narvaez and provided that officer with funds to pay the insurgent forces under his command. In 1846, when those whom he had served had come into power, M. d'Alborgo was made a Spanish noble with the unequivocal title of *Baron del Asilo*. On the 26th of March, 1848, a new insurrection broke out, attended with the utmost confusion, to which the extraordinary measures of the government contributed not a little. All the guarantees of the constitution were suspended; a council of war was substituted for the civil tribunals; promiscuous arrests were made; leading generals of the Progressist party were banished without trial and the streets of Madrid were made the scene of hostilities.[3] While

[1] British and Foreign State Papers, vol. lviii.

[2] *Ibid.* vol. lxii, p. 689.

[3] Foreigners did not escape violence. Among those who suffered was an inoffensive English Quaker, who was shot down by a soldier because, when challenged, he was unable, from stuttering, instantly to reply. In reporting this case to the Duke of Sotomayor, then minister of foreign affairs, Mr. Henry Bulwer, the British minister, lugubriously observed: "Another Englishman has been killed, simply because he had an impediment in his speech."

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these events were occurring, the houses of the foreign ministers were filled with refugees. On the 15th of April the Duke of Sotomayor instructed Señor Isturiz, the Spanish minister in London, to ask for the recall of Mr. Bulwer on the ground that he had directed "all his efforts and the influence of his official position" against the government to which he was accredited. As a convincing proof of this, it was alleged that his house at that moment served as a refuge for men implicated in the attempt against the government, and that "from that asylum they continue their machinations in concert with those without, in order to disturb anew the public order and tranquillity of this capital." On May 3 this charge was brought by the Duke of Sotomayor to the attention of Sir Henry Bulwer, in the course of a conversation in which, according to the official report of the latter, the duke

> confessed it was customary in this country to give asylum to persons pursued for political offences; that all Spanish governments have allowed this and all foreign agents have practised it, but that this custom had its limits.

Sir Henry denied the charge of protecting conspiracy and declared that he had but one person in his house, — "a person," he said, "whom his family had begged me to keep, in order that he might not mix himself up further in revolutionary schemes, which he had given me his word not to do." In concluding his report of the conversation, Sir Henry says:

> I then asked him (the duke) whether he would relieve me from the disagreeable position of still retaining in my house the person, whom [*sic*] I had admitted to him was there, by giving me a passport for the said individual. He said he thought he might; but having since told me that he could not furnish the said passport until some further time had elapsed, the gentleman in question, on my communicating to him what had taken place, left my house.

A few days after this conversation, the Duke of Sotomayor sent officers out to search for Señor Salamanca, his former partner in asylum, who, in the rapid shiftings of partisanship, had arrayed himself in opposition to the government of his

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associate in the revolution of 1843. The first house visited was that of M. d'Alborgo, still *chargé d'affaires* of Denmark, whose Spanish title seems on this occasion to have operated to his disadvantage. For, says Sir Henry Bulwer,

> the police, under M. d'Alborgo's protest, enter the house of M. Alborgo, Baron del Asilo, and search every corner in it; in contradiction, I believe, to the immemorial custom in Spain, which has seen no similar instance, save the celebrated one of the Duke of Ripperda, and in contradiction to the recent recognition of an usage which it might have been well to tolerate, but not to reward.

As Señor Salamanca was not found in the Danish legation, the search was extended to the dwelling of M. d'Alborgo's neighbor, the *chargé d'affaires* of Belgium. Here entry was refused to the police, but on receiving a communication from the Duke of Sotomayor, the *chargé d'affaires* assured the chief of police on his honor that the fugitive was not in the legation. "A strong force, however, of the police of the Ronda have surrounded the Belgian legation all yesterday and to-day," says Sir Henry Bulwer, in concluding his narrative.

On May 14, 1848, the British minister was given his passports, but not because he had assumed to grant asylum. The complaint, not that he had used, but that he had abused that privilege was only one of many, in large measure groundless, employed to cover the fact, which Sir Henry appreciated, that he was being made a scapegoat for Lord Palmerston, by whose direction he had communicated to the Duke of Sotomayor certain officious criticisms and suggestions which the latter indignantly resented. On June 3 the Spanish minister in London communicated to the British government, from the Duke of Sotomayor, papers containing six different reasons for Sir Henry's dismissal. One of these was that the latter had afforded protection "to many of the individuals most conspicuous in the conspiracy of the 26th, sheltering them in his house and allowing them to communicate from thence with the enemies of the government." Lord Palmerston, besides denying the truth of the charge, said:

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It is admitted by Sir Henry Bulwer that he conformed, on the occasion of the insurrection of the 26th of March at Madrid, to the custom which has long been established in that city, and according to which the houses of foreign ministers have been always open to afford sanctuary to political offenders until they might be able to find the means of leaving the country. . . . Her Majesty's government are quite ready to acknowledge that such a practice is in itself and in principle objectionable; but while it continues to exist, a foreign minister could not without discredit to himself and to his government refuse to comply with it; and I must be allowed to remark, that Her Majesty's government scarcely expected to find objections to that practice proceeding from General Narvaez, the Duke of Sotomayor or yourself. With regard to yourself, I need not remind you that the Earl of Clarendon, then Mr. Villiers, and British minister at Madrid, was able in 1836 to enjoy the great pleasure and the heartfelt satisfaction of affording you, when in danger, a temporary reception under the diplomatic protection of his roof; and that he was afterwards so fortunate as to contribute to your permanent safety by facilitating your removal from thence into Portugal.

His Lordship also adverted to the protection of the Duke of Sotomayor by the Danish *chargé*, in 1843, and to the duke's subsequent recognition of that service; and, after reviewing the five other causes of complaint and pronouncing them to be insufficient, he informed Señor Isturiz that Her Majesty could no longer continue to receive him and that he would "probably think it expedient to return to Madrid," — a suggestion which the minister immediately adopted.[1]

Nor was the granting of asylum at Madrid unknown after the incidents just narrated. In the revolutionary period of 1865–75, which, in respect of disorder and violence, reproduced the decade of 1840–50, the practice was resumed. In 1873, after the abdication of Amadeus, Marshal Serrano, who had taken an active part in placing that prince on the throne, was hunted by a mob. He fled from house to house, but at last repaired to the abode of the British minister, Mr. Layard, who subsequently disguised him and accompanied him by rail to Santander, where he embarked on a steamer for St. Jean de Luz.[2] Two years

[1] British and Foreign State Papers, vol. 38, pp. 928–1050.
[2] Annual Register, 1873, p. 226.

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later Mr. Cushing, then minister of the United States at Madrid, who, in addition to long diplomatic experience, possessed extraordinary knowledge of international law and practice, promised Señor Castro an asylum in his legation, and in reporting his action to his government observed that the granting of protection to political refugees in legations in the Spanish capital was a common usage which no one disputed. Señor Castro was not in the end compelled to seek the diplomatic shelter. This fact Mr. Fish, then secretary of state, in view of the attitude of the United States in former cases, pronounced to be "fortunate," and with that sturdy practical sense for which he was pre-eminent, declared further:

> The frequency of resort in Spain to the legations for refuge . . . may be accounted for by the prevalence of "conspiracy as a means of changing a cabinet or a government," and the continued tolerance of the usage is an encouragement of this tendency to conspiracy. It is an annoyance and embarrassment, probably, to the ministers whose legations are thus used, and as facilitating and encouraging chronic conspiracy and rebellion, it is wrong to the government and to the people where it is practised — a wrong to the people, even though the ministry of the time may not remonstrate, looking to the possibility of finding a convenient shelter when their own day of reckoning and of flight may come.[1]

It may have been observed that in the cases which have been found in Europe since the first quarter of the present century, the claim to grant asylum has assumed a new aspect. Formerly it was in regard to common crimes that the privilege was conceded, while in respect to political offences the right was denounced and violated. Now, asylum for common offenders is no longer heard of; it is for political refugees that it is claimed and tolerated. This fact possesses a manifold significance. It marks, in the first place, the growth of the idea of justice through the administration of law; in the second place, and partly as the result of that growth, it denotes the subsidence of asylum, both in principle and in practice; lastly, it shows an abrasion of former political conceptions. The judicial trial of common crimes having been secured, the

[1] Wharton's International Law Digest, vol. i, § 104, pp. 685–686.

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obstruction of the ordinary course of law was conceded to be inadmissible. But in politics a new principle appeared, to introduce temporary confusion. The principle of liberty, enforced by the exercise of "the right of revolution," threw society into a violent ferment, in which the political offender, if not extolled as a hero, was regarded as falling within Vattel's category of "persons who often prove to be rather unfortunate than criminal." It was because of this change in popular ideas, and not by a perversion of his language, that political offenders were to some extent accorded the benefit of his opinion that for unfortunates "the house of an ambassador may well serve as an asylum," and that it was better "to permit them to escape, than expose the ambassador to frequent molestation under pretence of a search after them, and thus involve the state in any difficulty which might arise from such proceedings." If any evidence were needed, in addition to that afforded by state papers, of the effect upon diplomatic asylum, wherever it has survived, of the development of criminal administration and the change in political conceptions, we might refer to the cognate fact that political offenders, who in former times were almost the only persons delivered up, are to-day exempt from the system of extradition that enmeshes the common criminal.[1] Experience, however, has taught that opposition to government may represent the spirit of anarchy rather than of liberty; that revolution can as readily destroy republics as monarchies; that elective magistrates, constitutional rulers and hereditary despots may alike fall by the hand of the assassin. Though the United States, instructed by its own tragedies, has not been alone in adhering to the principle that persons who murder or attempt to murder the head of the state or members of his family are not to be treated as political offenders,[2] it has shown its repugnance

[1] Moore on Extradition, vol. i, § 205.

[2] Moore on Extradition, § 208; Treaty with Belgium, June 13, 1822, art. iv; with Luxemburg, Oct. 29, 1883, art. iv. These treaties were concluded while the impression made by the assassination of Garfield was still fresh. After the assassination of Lincoln and the disclosure of the plot to murder his cabinet, the United States applied to foreign governments to give up any of the malefactors who might find refuge within their jurisdictions, and John H. Surratt, one of those charged with complicity, was captured and brought back from Alexandria, Egypt. Moore on Ex. § 208, note 4.

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to disorder by condemning, more emphatically perhaps than any other nation, the concession of diplomatic asylum to revolutionists, and by refusing, so far as seemed practicable, to grant it. Its attitude on this subject has been most frequently defined in the case of American nations, the practice in connection with which I shall next proceed to consider.

IV. *Asylum in America.*

In the United States, where the supremacy of the local law is rigorously maintained, diplomatic asylum has never existed. With this exception, it is believed that examples of it may be found in every independent American state. In the countries that were formerly Spanish colonies, the practice may be said to have been inherited; and in some of them it has been so far extended as to include persons resting under civil and commercial responsibilities.[1] The principal excuse for its continuance has been found in the constantly recurring tumults which fill so many pages in the history of American republics, and which, by reason of their partisan complexion, Mr. Seward once described as representing a "chronic revolutionary condition."[2] Moreover, there is a general impression that these tumults, which are often attended with little bloodshed, are characterized by great vindictiveness and cruelty on the part of the victors towards those who are temporarily vanquished. Humanity, therefore, is invoked to sustain the practice of asylum; and it is stated that the practice exists and is maintained with at least the tacit consent of the local government, which recognizes it as a wholesome and beneficent usage. To what extent these arguments are justifiable, I shall endeavor to ascertain by the examination of actual cases which have chiefly been found in those rich but too often neglected repositories of authoritative usage — the volumes of diplomatic correspondence. The cases arising in each country will be grouped, and the groups will be

[1] Albertini, Derecho Diplomatico en sus Aplicaciones a las Republicas Sud-Americanas, pp. 151–152.

[2] Wharton's Int. Law Digest, vol. i, § 104, p. 678.

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presented in a chronological order determined by the date of the latest case. When the review shall have been completed, and the facts shall have been disclosed, we shall know whether and how far asylum has been acknowledged as a right by the peoples among whom it has been granted; whether it has been administered prudently and fairly and within legitimate bounds; whether it has been gratefully accepted as a humane and beneficial usage, or whether it has been endured as an abuse which has been forced upon protesting governments by the joint compulsion of foreign representatives, contending for excessive and unequal privileges, and sometimes animated with that spirit of international morality so inimitably expressed by Lowell:

> Our nation's bigger'n their'n an' so its rights air bigger.

1. *Venezuela.*

"In 1858," says Rafael Seijas, the eminent Venezuelan publicist,

> there occurred in Caracas a case which the *chargés d'affaires* of France and England pretended to invest with a special character, and in which they alleged that the principles of European public law were not applicable to America.

The controversy arose with the granting of asylum by the French *chargé* to General Monagas, then lately driven from the presidency of Venezuela. In order to consider the situation thus created, Señor Urrutia, Venezuelan minister of foreign relations, invited the diplomatic corps to a conference, which was held on the 26th of March. Besides Señor Urrutia, there were present the diplomatic representatives of the United States, France, Great Britain, Spain, Brazil and the Netherlands. Señor Urrutia proposed as a necessary basis of discussion that General Monagas should be placed at the disposal of the government, and after some debate a protocol was drawn up and signed by all present. By this protocol it was agreed that General Monagas should, in writing, place himself at the disposal of the government, at the same time promising that he would not

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oppose the progress of the revolution; that this declaration should be transmitted by the *chargé d'affaires* of France to the Venezuelan government, whose members pledged their word that General Monagas should not be subjected to trial or in any way molested, but that he should be treated with decorum and respect; that he should be accompanied to his house by the governor of the province, and that the French minister or any other member of the diplomatic corps desiring so to do might go with them; that there should be in the house two respectable persons appointed by the government to see that the general was well treated and not subjected to insult; that his wife and one of his sons should be allowed to accompany him, and that his other children, the members of the diplomatic corps and all persons not inspiring the government with distrust might come and go as they pleased; that the Venezuelan government would be responsible for his safety while he remained in his dwelling, and that at the expiration of his stay, which was to be as brief as possible, he should be given a safe-conduct for himself and his family to go to a foreign country, where they were to remain as long as was necessary for the peace of Venezuela. The diplomatic corps individually and collectively pledged their word to make every effort within the sphere of their *moral action*, in order that the promises made by General Monagas in his letter of submission might be effective.

General Monagas wrote his submission, but the government of Venezuela, while abstaining from any act of violence, repudiated the protocol and compelled Señor Urrutia to resign. On April 21, Señor Toro, his successor, informed the members of the diplomatic corps, (1) that the government of Venezuela considered the co-operation of the foreign representatives in the case as merely an exercise of their good offices, and the signing of the protocol by them as only a solemn testimonial of the promise made to General Monagas by Señor Urrutia; (2) that the government did not consider the foreign representatives as parties to that promise, or believe that they intended to interfere in the domestic affairs of Venezuela, which could not be tolerated. Mr. Eames, the minister of the United

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States, replied that this declaration contained an exact definition of the significance and character of the paper, which bound only the honor and good faith of the government; and his opinion was concurred in by the representatives of Brazil and the Netherlands. The *chargé d'affaires* of Spain said that the diplomatic corps had been called in as "intercessor, mediator, witness, and then as a party in a certain manner and to a certain extent," though he disclaimed any purpose to intervene in Venezuelan affairs.

On the 10th and 15th of April, Mr. Levrand and Mr. Bingham, the representatives of France and Great Britain, who seem at the time to have lived in the same building, complained that their dwellings had been violated, and suspended diplomatic relations. It seems that the Venezuelan government had required the delivery of two persons called Gutierrez and Giuseppe, whom the French representative was protecting, and had also, for reasons which it deemed sufficient, prevented the departure of General Monagas, though the promise in regard to his safety was kept.[1] Señor Toro defended the action of the government. He claimed for Venezuela the same rights that were accorded to governments in Europe, and asserted the rule laid down by Baron C. F. de Martens, that if a minister grants asylum to persons prosecuted for crimes or offences, the government may not only surround his hotel, to prevent the escape of the culprits, but, if the minister refuses to give them up on the solicitation of the competent authority, may also take them by force.[2] On the 5th of May the commanders of certain French and British ships of war assumed to demand reparation, which the Venezuelan government refused to grant.[3] The difficulty was adjusted by negotiation.[4]

[1] Other grievances also were alleged. Mr. Bingham complained of having been burnt in effigy — an act which Señor Toro sought to explain by saying that it occurred on the day of the Feast of the Resurrection, when it was customary in Catholic countries as a pastime to hang up and burn something early in the morning in commemoration of the treacherous disciple.

[2] Guide Diplomatique, Geffcken's ed., § 29.

[3] Seijas, El Derecho Internacional Hispano-Americano, vol. ii, pp. 78–94.

[4] In his message to the Congress, April 12, 1860, the Vice-President of Venezuela says: "This incident, the account of which will be presented by the minister of

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2. *Peru.*

In Peru, not inaptly described as "that classic country of revolution," [1] diplomatic asylum has often been granted, but it has also been plainly denied. In 1853 the governor of one of the provinces seized some political agitators who had sought shelter in a consulate of the United States. Mr. Marcy, then secretary of state, though a strenuous asserter of the rights of his government, held that

> neither the law of nations nor the stipulations of our treaty with Peru recognize the right of consuls to afford protection to those who have rendered themselves obnoxious to the authority of the government under which they dwell.

He further said:

> The subsequent course of the governor, in sending to the consulate and arresting the insurgents, cannnot be condemned by this government. The national flag was not insulted, nor the national dignity affected by this proceeding. The former had been unwarrantably used. . . . The government of the United States would not permit such an abuse of a foreign flag by a foreign consul to be made with impunity.[2]

These views, however, were applied to the case of a consul. A year later the minister of the United States at Lima asserted, apparently without disapproval, the right of the legation to

foreign affairs, happily terminated in a manner satisfactory to our national dignity, and gave rise to certain negotiations which will be only made known to you by that department. It is but justice to make honorable allusion here to the licentiate, José St. Jago Rodriguez, to whom was confided in Paris the special mission of explaining to the French government the true character of the proceedings adopted by the executive power relative to Mr. Levrand. . . . Subsequently the friendly relations between the two countries . . . have definitely recovered the genuine cordiality of former times." Br. & For. St. Pap. vol. 51, p. 1305. How long diplomatic relations between Great Britain and Venezuela remained in suspense, I am not informed. It appears, however, that a Postal Convention between the two countries was signed by the British Minister at Caracas, May 1, 1861. *Ibid.*, vol. 52, p. 944. The message of the Vice-President of Venezuela refers to the disturbance of relations with France, but not with England.

[1] Don Federico Elmore, quoted in Bello, vol. ii, note HH, p. 332.

[2] Whart. Int. Law Dig. § 104. In an instruction to another minister, Mr. Marcy said that a consul of the United States in Nicaragua had no right, as such, "under the law of nations, to make his dwelling an asylum for persons charged with crimes or offences against that government." *Ibid.*

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grant asylum. The occasion of this assertion was the communication to the diplomatic corps on January 23, 1855, of a circular containing a decree of the revolutionary government that had been installed on the fifth of that month, to the effect that "the ex-generals and all the refugees in the legations or on the foreign vessels" should "leave the republic for the isthmus of Panama, or go by that route." The minister of the United States replied that as foreign legations were "entirely extra-territorial," and as the government of Peru had no jurisdiction either over them or over foreign vessels of war lying in her ports, he presumed that the object of the circular "was to notify the Peruvian citizens *in asylum* in this legation, that they should prepare to leave the republic," and was not intended "to affect or in any manner diminish the privileges secured to the undersigned by the law of nations."[1] The British minister, "as an act of pure courtesy," wrote that "the only refugee in the legation of Her Britannic Majesty was General Echenique, who left on yesterday's steamer"; but he also commented upon the "unbecoming tone of command" that pervaded the circular, and declared that he did "not admit that the provisional government of Peru" had "the right to issue orders on subjects which concern Her Britannic Majesty's legation, or the commanders of her war vessels." Of the same purport was the reply of the French minister, who, however, further informed His Excellency that he should ask him "at the proper time," to give the refugees in the French legation a sum of money sufficient "to take them abroad" and a "passport without designation." The minister of Brazil, while deploring that "the necessity should exist in Peru of having recourse to the exercise of the right of asylum established in times when misfortune had need of every species of guarantees against the barbarity of the middle ages," declined, without consulting his government, to enter into a discussion of the right in question, which had been "officially recognized and constantly respected by all the governments" in Peru since its independence. If the present government, he continued, desired to introduce changes, he would communicate

[1] Lawrence's Wheaton (1863), note 137.

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the fact to his government: meanwhile, he was obliged to inform His Excellency

> that, whatever be these changes, they cannot take effect without the previous accord of the whole diplomatic body, which enjoys them as an acquired right; as it does not seem conformable to the laws of equity that the present refugees should be treated with greater severity than their predecessors in misfortune.

He therefore declined, as his colleagues had done, to give his refugees the directions contained in the decree.[1]

Ten years later the question of asylum arose again in Peru. In May, 1865, General Canseco, then engaged in an attempt to overthrow the government of General Pezet, was sheltered in the house of Mr. Robinson, the American minister. The Peruvian government having protested against this act, the diplomatic corps agreed on the following points: (1) That apart from inhibitions in their instructions or in conventional stipulations, there were limits to the privilege of asylum which the prudence of diplomatic agents ought to counsel; (2) that the diplomatic corps adopted the instructions given by Brazil to its minister, according to which asylum was to be conceded with the greatest reserve, and only for such time as was necessary in order that the fugitive should secure his safety in another manner — an end which it was the duty of the diplomatic agent to do all in his power to accomplish. It was also agreed that these rules, which, in the absence of authoritative instructions, were adopted provisionally, should apply only to offences properly called political. The Peruvian government declined to accept these conclusions, objecting with great force that as they left everything to the discretion of the diplomatic agent, they afforded no solution of the difficulty then existing.[2]

In the following October a new minister of the United States, Mr. A. P. Hovey, set out for Peru with instructions to recognize only the government of General Pezet, and if, when he arrived at the Peruvian capital, he found the revolutionary party in

[1] Bello, ed. 1883, vol. ii, HH, p. 332.

[2] Pradier-Fodéré, Cours de Droit Diplomatique, vol. ii, p. 79.

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power there, to report the facts and await further directions.[1] On the 6th of November, a few days before Mr. Hovey's arrival at Lima, General Canseco, who seems to have had a safe deliverance from the American legation, captured the city and assumed control, only to be displaced in three weeks by Colonel Prado, who, at the instigation of certain officers of the army, was proclaimed dictator.[2] When defeated at Lima, General Pezet, with some of his ministers, fled to Callao and escaped on foreign men-of-war.[3] Four of his cabinet, however, sought asylum in the French legation, where they remained unmolested till near the close of December. On the 19th of that month the central court decreed their arrest on charges of peculation, conspiracy and treason, and the government subsequently requested M. Vion, consul of France and *chargé d'affaires ad interim*, to deliver them up, which he refused to do. Admitting that the privilege of asylum had been abused, he declared that its benefits "amply compensated for a fault inspired by the sentiments of humanity."[4]

On December 20, 1865, Mr. Hovey informed his government that several applications for asylum had been made to him by Peruvian citizens charged with crime against the republic, and that he had refused to grant them.[5] He added:

> A different practice has prevailed in Peru, and the houses of foreign ministers have become little less than the abode of criminals who flee from the vengeance of the law. It seems that this practice is highly censurable and leads to very evil consequences. . . . I have refused to recognize the doctrine of asylum as practised in this country, until I am otherwise directed by the Department of State.[6]

The receipt of Mr. Hovey's despatch was acknowledged without comment, and upon this implied approval he acted till his position was expressly sanctioned.[7]

In consequence of Peru's war with Spain, the discussion

[1] Dip. Cor. 1866, part 2, p. 617. [2] *Ibid.* p. 621. [3] *Ibid.* p. 618.

[4] Pradier-Fodéré, Cours, vol. ii, p. 79 *et seq.*

[5] He cited as authority for his action: Wheaton, § 18, p. 416; Woolsey, Int. Law, § 92 b; Polson, Law of Nations, § 31. [6] Dip. Cor. 1866, part 2, p. 624.

[7] Dip. Cor. 1866, part 2, p. 629; *Ibid.* 1867, part 2, p. 736.

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thus begun was interrupted for more than a year. But on January 15, 1867, a conference of the diplomatic corps was held, at the summons, and under the presidency, of the minister of foreign affairs, Señor Pacheco. All the members of the corps were present but Mr. Hovey, who, though unable to attend, on the same day communicated his views to Señor Pacheco in writing, as follows:

> I believe that Peru is entitled to all the rights and privileges of a Christian nation, and as such should be placed precisely in the position of the United States, France, England and other Christian countries, and that the doctrine of asylum cannot be properly claimed or enforced here unless it be to shield persons from the violence of a mob. As soon as a legal charge of crime is made, whether political or not, I hold it to be the duty of the minister in whose legation the offending party has taken refuge to deliver him up to the legal authorities demanding his arrest. . . . Notwithstanding this view, if the government of Peru should feel disposed to concede greater privileges to others, I, as the representative of my government, would expect to be entitled to the same privileges granted them. In conclusion, I would briefly say, while I have the honor to represent my country, I shall claim no right here that my government would not accord to the representative of Peru in Washington.[1]

At the conference Señor Pacheco presented this communication and, arguing that "the right of asylum was introduced in Spanish America on the pretext of a pretended humanity," asked that it should be abolished. M. E. P. de Lesseps, *chargé d'affaires* of France, replied that the meeting was called to consider the regulation of the right and that he was not empowered to discuss its abolition. The conference then broke up. The instructions of M. de Lesseps, which proceeded from M. Drouyn de Lhuys, French minister of foreign affairs, were to the effect that since the right of asylum only facilitated the departure from the country of men who could not remain in it without peril both to themselves and to the government, it was too conformable to the sentiments of humanity for France to forego it; especially as it appeared by the agreement of the diplomatic corps at Lima of May, 1865,[2] in which the European

[1] Dip. Cor. 1867, part ii, p. 738. [2] *Supra*, p. 28.

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and a majority of the American representatives concurred, that the right was generally admitted in America, if exercised within the limits of prudence and good faith.[1]

On the 21st of January the diplomatic corps held a meeting to consider what further steps should be taken before conferring again with the Peruvian government. At this meeting Mr. Hovey proposed the following resolutions:

1. The diplomatic body here assembled resolves that they, and each of them, jointly and severally, acknowledge and recognize Peru as a Christian nation.

2. As each Christian nation should, by international law, be entitled to all the rights properly claimed by others, therefore—*Resolved:* That Peru is entitled to the same rights and privileges, through her diplomatic agents abroad, that we, as representatives near the government of Peru, are respectively entitled to have, and that we cannot in justice claim more than our respective governments accord to the representatives of Peru. Therefore,

3. *Resolved:* That we recognize the law of nations, as relating to the questions of asylum, to be the same as practised in the United States, and in England, France and other Christian nations of Europe.

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The diplomatic corps did not accept these resolutions, but in reporting the fact to the Department of State, Mr. Hovey made a statement which is so significant that I am compelled to quote the following passage:

I do not believe that the history of Peru can furnish a single example where the innocent have been shielded by asylum; nearly all the cases of which I have heard are those applying strictly to citizens of Peru charged with conspiracy or treason. One case, that of Captain Carwell, an Englishman, turned upon the point of his contempt of court in an order made for the delivery of property. Refusing to obey the warrant of the court, he fled for protection to the English legation, from whence, after eleven months, he made his escape, still refusing to obey the orders of the court, and taking with him the property in dispute. Another case, which transpired shortly before my arrival, was that of General Canseco, Vice-President of the republic, charged with conspiracy against the government; he remained in the legation of the United

[1] Pradier-Fodéré, Cours, vol. ii, pp. 79–83.

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States some three or four months, where he was in daily communication with his co-conspirators. At length he agreed with President Pezet to exile himself to Chili upon the payment of one year's salary; he received the pay, was permitted to depart, landed in two days upon the coast of Peru, and a few weeks afterwards returned with an invading army to the walls of Lima. The third case involves the question now pending between France and Peru. . . . As no person arrested by the government upon any charge has as yet suffered the extreme penalty, it is apparent that the plea of cruelty or barbarity cannot be sustained as the cause for giving asylum. Peruvians were dealing with Peruvians, and should, in my opinion, have been left to their own laws and courts. The practice of giving asylum has been and still is a prolific source of revolutions in, and the instability of, the South American republics. . . . If there should be a single unfriendly minister to the government here (and there always is), his legation at once becomes the asylum and headquarters of the conspirators against the government. . . . In my opinion that man will prove a benefactor to South America who breaks down this ancient relic of barbarism and aids in bringing the guilty to the quick punishment of the laws against which they may have offended. . . . It need not be feared that the innocent would suffer; these people are peculiarly mild in their punishments, and crime is not as common in Lima (excepting conspiracy) as it is in Europe or in the United States. Since I have resided here not a single execution has taken place, although five or six several attempts have been made to revolutionize the government or kill the President.[1]

What a commentary on the argument of M. Drouyn de Lhuys that the granting of asylum was required not only to secure the observance of the principles of humanity, but also to rid the country of the perilous presence of conspirators!

When Mr. Seward received Mr. Hovey's despatches, he said:

I observe that . . . you have taken these positions, *viz.*: That Peru is entitled to all the rights and privileges of a Christian nation, and as such should be placed precisely in the position of the United States, France, England and other Christian countries, and that the doctrine

[1] Dip. Cor. 1867, part ii, p. 736. As an example of the "more than Christian charity" of the Peruvians in their political contests, Mr. Hovey transmits to Mr. Seward, June 28, 1867, a decree of the Congress ordering the remains of Grand Marshal Ramon Castilla, who died on the 30th of May while at the head of a rebellion against the government, to be brought to Lima and deposited in a mausoleum of marble for which 16,000 soles were appropriated.

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of asylum cannot be properly claimed or enforced in Peru, unless it be in exceptional cases recognized by the universal law of nations; that as soon as a legal charge of crime is made, whether political or not, you hold it to be the duty of the minister in whose legation an offending party has taken refuge to leave him without interference to the authorities demanding his arrest. Again, that you claim no diplomatic power or right in Peru that your government does not accord to the representative of Peru in Washington.

These positions are altogether approved.[1]

On the 29th of January another conference with the Peruvian government was held, Señor Pacheco presiding. There were also present Mr. Hovey; Mr. Barton, acting *chargé d'affaires* of Great Britain; M. de Lesseps, *chargé d'affaires* of France; Signor Cavalchini, minister resident of Italy; Mr. Eldridge, *chargé d'affaires* of Hawaii; Señor Benavente, envoy of Bolivia; Señor Martinez, envoy of Chili; Senhor Varnhagen, minister resident of Brazil. Senhor Varnhagen said he would not contend that asylum was a right, nor would he discriminate between American and European nations. But as a diplomatic agent in Europe, he had observed that asylum had been granted in revolutionary periods in Spain, Italy and Portugal, and even in France during the revolution of 1848, probably with the effect of preventing acts of inhumanity. A declaration abolishing it would destroy diplomatic inviolability, which would also be endangered by denying asylum in a special case. Serious questions might sometimes arise between foreign ministers and the secretary of foreign affairs, depending on the more or less conciliatory character of the latter. He thought, therefore, that asylum should be maintained as a practice in order to avoid greater difficulties.

Señor Martinez, acting under the instructions of his government, abstained from discussing principles and limited himself to the consideration of asylum as a humane usage, which had its origin in political agitations that excited the passions. It had frequently happened that when those who had been in asylum were leaving it to occupy high stations, those who had

[1] Dip. Cor. 1867, part ii, p. 763.

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been in power were obliged to seek shelter under the diplomatic roof. Nevertheless, the government of Chili, though convinced that the practice of asylum had been abused and that it caused unpleasant discussions with foreign ministers, had deemed it advisable not to abolish the custom altogether, but to regulate it by fixed principles and confine it to certain cases, particularly to those in which the life of the refugee was endangered.

M. de Lesseps said that it was necessary before all things to save the principles of inviolability and extraterritoriality. If it was intended to deny the principle of inviolability and admit the possibility of violence against the house of a minister, he did not feel authorized to enter into the discussion.[1]

Señor Benavente was authorized to concur in the regulation of asylum, but not in its abolition. He said that according to the assertions of MM. Varnhagen, Cavalchini and de Lesseps, the practice was known in Spain, Portugal and Italy, and that Signor Cavalchini knew of a case of temporary asylum in the United States during the civil war.

Mr. Hovey replied that the practice did not exist in the United States, and that if a case had occurred and the government had demanded the delivery of the transgressor, he would have been given up. If a special custom had existed in Peru, it could be a subject of discussion between the government of the country and the foreign ministers; but in order that a custom might acquire the force of law, it must have existed for a long time and without controversy: the diplomatic corps had no right to create new rules of international law.

Señor Pacheco did not regard the ideas expressed by Señor Martinez as incompatible with the position of the Peruvian

[1] It is obvious that the argument presented by Senhor Varnhagen and M. de Lesseps involved a confusion of ideas. This is suggested later by Señor Pacheco, and will be fully demonstrated when we reach the discussion of general principles. There is no logical connection between the exemption of the house of a minister from violence, and the concession to him of a right to protect offenders against the demands of the lawful authorities. The confusion on this subject, as will hereafter be explained, arises from a misconception of the origin and nature of the immunities of diplomatic residences.

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government, which admitted asylum in the case of danger of death, as a rule of international law. But if the government demanded the delivery of a person indicted for a crime, he should be given up.

Mr. Barton suggested: "after sentence."

Señor Pacheco replied that the accused should be surrendered for trial. As to the argument that the abolition of asylum would impair the immunities of foreign ministers, Señor Pacheco observed that, if this were so, he would be forced to believe that in countries where there was no asylum diplomatic immunities did not exist. Repudiating also the alleged obligations of humanity, he invoked the testimony of all present that no act of violence had ever been committed in Peru to justify such an argument, and he referred besides to the penal legislation of the country, in which capital punishment was limited to certain cases of murder. He had been happy to hear the declaration of Senhor Varnhagen, that asylum was not a right, but he could not accept his observation as to questions possibly arising from the lack of a conciliatory disposition on the part of the secretary of foreign affairs. A question of principle could not be solved by considering personal traits, and if there happened to be an obstinate foreign secretary, there might be a foreign minister equally obstinate.

M. de Lesseps said he had not expected that the conference would result in placing the members in different positions, and he hoped that, without reference to principles, they would, in deference to public opinion, come to an agreement. For himself, he would accept a decision based on the instructions of the minister of Chili, the ideas of Senhor Varnhagen, his own instructions, or the ideas which Señor Pacheco himself might express in writing after mature consideration.

Señor Pacheco said that he had been studying the subject for more than a year. He was about to read a memorandum containing the conclusions of his government, when, owing to the lateness of the hour, it was suggested that the document should be sent to the dean of the diplomatic corps. The conference was then adjourned.

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In this memorandum, which was duly transmitted on the 1st of February, Señor Pacheco ably sustains, both by argument and the citation of authorities, the views presented by him in the conference. Moreover, he forcibly remarks that although the frequency of changes and commotions in South America has been alleged as an excuse for asylum, those who have engaged in them, conscious that to-morrow they may be treated according to the measure of their own conduct, have generally abstained from acts of cruelty or ferocity which sometimes occur in lands where, because the government is more stable, the attempt to overthrow it generally lasts longer and excites greater vindictiveness. Nevertheless asylum had, said Señor Pacheco, been granted in Peru, not only to those in possible danger of losing their lives, but also to all classes of persons: to those terrified by fancied persecutions; to those against whom judgments had been pronounced by the legal authorities; and to those who wished to rid themselves of obligations purely civil. Such a practice, which put a veto upon the administration of justice, constituted a refusal to recognize the sovereignty and independence of the nation and injured its highest rights. In conclusion Señor Pacheco made the following declarations:

1. That the Peruvian government will not hereafter recognize diplomatic asylum as it has been practised up to the present time in Peru, but solely within the limits assigned to it by the law of nations, which are sufficient to include the exceptional cases which might arise in this matter.

2. That, as diplomatic asylum exists in the states of South America, and therefore the legations of Peru in those states enjoy its exercise, Peru renounces on her part the right of her legations in such states to the said privileges, and denies the same to the legations of such states in Peru.[1]

Against these declarations there does not appear to have been any protest. The ministers of Chili and Brazil, while reserving any question that might be raised, referred the matter to their governments; but the former stated that he was not aware of

[1] Dip. Cor. 1867, part ii, pp. 739–745.

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the existence in Chili of "anything extraordinary or exceptional" to affect "the modern law of nations in the matter of asylum." Mr. Hovey formally accepted the Peruvian declarations, and afterward communicated to the government a general order of the admiral commanding the squadron of the United States in the Pacific, accepting the conclusions of the memorandum and applying them to his vessels.[1] On May 30, 1867, the Peruvian minister in London reported that Lord Stanley, then secretary of state for foreign affairs, having read the memorandum, had concurred in the views of the Peruvian government. His lordship remarked that if any Fenians were to take refuge in an embassy in London, it would be ridiculous to suppose that the British government would have no right to reclaim them. The right of asylum had, he said, been greatly abused, and he hoped that it would be limited and finally done away with altogether.[2]

Within a year from this time a series of events in another South American state contributed something to the fulfilment of Lord Stanley's hope. That state was Paraguay.

JOHN BASSETT MOORE.

[1] The text of this order is not given by Mr. Hovey. But he communicates to Mr. Seward, without dissent, the version of it given by the minister of foreign relations in his report to the Peruvian Congress, which is as follows: "The admiral says that asylum had not been granted to this time except from motives of humanity; but as in his opinion that practice had only existed through the tolerance of the Peruvian government, that government formally repudiating it, the vessels of war of the United States ought to conform fully and in good faith to the wishes of the Peruvian government in a matter which exclusively concerns it and its subjects."

[2] Dip. Cor. 1867, part ii, p. 773.

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THE FINANCES OF THE CONFEDERATE STATES.

THE legislation of the United States during the Civil War introduced three new factors into American finance, namely, the bonded debt, the legal tender notes and the national bank system, — all three the direct or indirect means of carrying on a great war. While the North was driven to these devices for raising money and supporting the government's credit, the South also was attempting every known expedient for securing the necessary revenue with which to repel the Northern invaders. In many ways the North and the South were similarly situated: their organic laws closely resembled each other; their commercial and financial traditions were the same; their financiers had been trained in the same school in Washington; and the demand for revenue was equally pressing in the two sections. Hence it is natural that the financial policies of the two governments should have run more or less closely parallel, the divergencies finding an explanation in the economic isolation of the South and in kindred considerations. To illustrate this similarity of tendency I have selected the three phases in the financial history of this country during the war which were alluded to above, namely, the growth of the public debt, the issue of treasury notes with the legal tender quality in payment of public and private debts, and the creation of a national bank system.[1]

1. *Public Debt and Taxation.*

Every one is familiar with the character of the Federal revenue during the Civil War. A few figures will bring out its

[1] In the preparation of this article I am under great obligations to Mr. R. P. Thian, chief clerk of the adjutant general's office, who has collected from the Confederate archives in the War Department at Washington, a mass of material bearing on the financial history of the South during the war. It is to be hoped that our Congress will soon see fit to have this valuable collection published.

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salient features. During the quarter ending September 30, 1861, 92 per cent of the Federal revenue was derived from the issue of bonds and treasury notes. For the fiscal year 1862 the figure was 91 per cent; for 1863, 87 per cent; for 1864 and 1865, 81 per cent. While the part of the Federal revenue which was derived from voluntary and forced loans relatively fell off, the other items relatively increased. The internal revenue system, which did not exist in 1861, appeared first among the sources of revenue in 1863, contributing four per cent to the total revenue in that year, eight per cent in 1864 and 12 per cent in 1865. Revenue from the direct tax appeared first in the fiscal year 1862, when it amounted to one-third of one per cent of the total. In 1865 the corresponding figure was two-thirds of one per cent. The revenue from import duties formed a considerable item during the war, amounting to seven per cent of the total revenue during the quarter ending September 30, 1861, to eight per cent during the fiscal years 1862 and 1863, and declining to seven per cent and five per cent in 1864 and 1865 respectively. In other words, at the beginning of the war, the Federal revenue was practically composed of loans and import duties. In the course of the war these two items decreased in relative importance, and were to a certain extent displaced by the taxation of industry through the internal revenue system.

Turning to the Confederate States, we find that the issue of bonds and treasury notes furnished 99 per cent of the total revenue from July 20 to November 16, 1861. The corresponding figure for the year ending February 17, 1862, was 91 per cent; for the remainder of 1862, 96 per cent; for the first nine months of 1863, 95 per cent; for the six months ending March 31, 1864, 90 per cent, and for the following six months 85 per cent. The largest of the remaining items of revenue was always the so-called war tax, of which more below. This direct tax contributed seven per cent to the revenue during the year ending February 17, 1862; four per cent during the remainder of 1862; nine per cent during the six months ending March 31, 1864, and eleven per cent during the following six months.

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Owing to the blockade, the receipts from import duties declined rapidly to one per cent of the total revenue during the year ending February 17, 1862, and to a much lower figure before the end of the war. For the same reason the cotton export duty, of which so much had been expected, yielded only insignificant sums, namely, $1312 from July 20 to November 16, 1861, and $35,756 from January 1, 1863, to October 1, 1864, — the latter sum being equal to perhaps $3000 in specie at the time of collection. Other items of revenue were: confiscated property, which yielded $9,121,283 ($600,000 in specie) from January 1, 1863, to September 30, 1864; refunding of old issues of treasury notes, which yielded $15,089,742 ($700,000 in specie) from April 1 to September 30, 1864; the military exemption tax, yielding $635,537 ($40,000 in specie) from October 1, 1863, to September 30, 1864; patent fees, yielding $52,537 ($11,000 in specie), from February 18, 1862, to September 30, 1864; and several others of minor importance.

A study of these figures establishes the following facts: The Confederate revenue was at the beginning of the war derived almost entirely from loans of various kinds. As the war went on a small but increasing part of the revenue was raised by taxation and by such expedients as confiscation and scaling of the currency. From the character of the situation the Confederate government could not count on a customs revenue, while the economic conditions of the South precluded the possibility of an indirect taxation of industry. Accordingly the South, in developing its revenue system, was obliged to rely on direct taxation, while the North depended little on this method and developed the more its internal revenue system. A comparison of the relative amounts of the Southern war tax and the Northern direct and indirect taxes clearly brings out this fact. But the relatively great importance of direct taxation in the Confederacy is somewhat lessened when we recall that the war tax was apportioned among the states and could be assumed by them. This was done in some cases and state bonds were issued, the proceeds of their sale flowing into the Confederate

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treasury in payment of the states' share of the tax.[1] So that a part at least of the war tax was in fact a *loan* effected by the states instead of by the Confederate government.

The common statement that the South carried on the war by means of the unlimited use of the printing press evidently requires some qualification. At the beginning of the war the government was no doubt anxious not to alarm the people with immediate schemes of taxation and hence relied entirely on borrowing;[2] but by 1864 it had developed a system of war taxes[3] which raised eleven per cent of the entire revenue in the states east of the Mississippi, during the half-year ending September 30, 1864. This figure compares favorably with the proportion of Northern revenue derived from direct and indirect taxation during the same period, namely, fifteen per cent. In addition to the war taxes, payable in currency, the taxes in kind must have weighed heavily on the people; but of this form of forced contribution we have unfortunately but scanty records. This is also true of the extended system of impressments. However, as impressed articles were presumably paid for with bonds or treasury notes, the income under this head is included among the receipts from loans. If we add to the Confederate tribute the state and local taxes, which were collected with more or less difficulty, we get a fair picture of the very considerable burden of taxation in the South during the war.

The generally accepted notion that the financial policy of the Confederacy may be characterized as a series of blunders is far from the truth. The statesmen of the South saw the necessity of taxation as clearly as did those of the North. Considering the conditions imposed upon their country, on the one hand by

[1] Acts: Alabama, Nov. 27, 1861 (Joint Resolutions, Dec. 8, 1862); Mississippi, Dec. 20, 1861; South Carolina, Feb. 6, 1863; North Carolina, Feb. 17, 1862; Virginia, Feb. 21, 1861, March 12, 1863.

[2] E. A. Pollard, Life of Jefferson Davis (1869), pp. 171–172; Speech of Vice-President A. H. Stephens, quoted in Appleton's Annual Cyclopædia for 1861, p. 143; F. H. Alfriend, Life of J. Davis (1868), p. 483.

[3] Secretary Memminger's Report, July 24, 1861. Confederate Acts, Aug. 19, Dec. 19, 1861; Sept. 23, 1862; March 28, April 24, May 1, Nov. 18, Dec. 1, Dec. 28, 1863; Jan. 30, Feb. 17, June 1, 1864; Feb. 23, March 11, March 13, 1865. David Dodge in *Atlantic Monthly*, 58, 242 (Aug. 1886).

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the Federal forces, which blockaded the coast and overran the interior, thereby preventing the collection of duties and largely hindering the levy of taxes, and on the other hand by the economic conditions of the country, which had established no extended industries that could be reached by indirect taxation, the Southern financiers deserve credit for their strenuous efforts to find other sources of revenue besides the issue of bonds and treasury notes. Equally creditable were the efforts to float Confederate bonds in preference to issuing treasury notes. From May 11 to July 19, 1861, only 17½ per cent of the total revenue was raised by floating bonds. During the following four months the fraction rose a trifle. During the six months ending August 18, 1862, the figure was 28 per cent, during the first nine months of 1863, 30 per cent, and during the six months ending March 31, 1864, 49 per cent. In the mean time the proportion of the total revenue raised by issuing notes had fallen from 68½ per cent during the first year of the Confederacy to 41 per cent during the six months ending March 31, 1864. In a word, these figures prove that up to 1864 the Confederate government had succeeded in relatively increasing its revenue from the sale of bonds and in relatively decreasing its paper money issues. But the summer of 1864 changed everything. The campaigns of Grant and Sherman turned the tide; the price of Confederate bonds fell to a ruinously low figure in the market, and during the half-year ending September 30, 1864, only 14 per cent of the revenue was derived from the sale of bonds, while 71 per cent came from note issues.

2. *Legal Tender Notes.*

The North was not alone in agitating for a legal tender act. The question of the advisability of declaring treasury notes receivable in payment of all debts, both public and private, was fiercely debated in the South before and after the same question in the North had been definitely answered in the famous law of February 25, 1862. The arguments against the adoption of such a measure by the Confederate Congress were the

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counterpart of the arguments of the opponents to the Federal act of 1862.

The constitutional question was essentially the same in North and South. Both constitutions granted to the Congress, in practically the same words, the power to borrow on the credit of the government, to coin money, to wage war and to make the necessary laws for carrying the delegated powers into execution.[1] But the clause in the Federal constitution which granted the Congress power

> to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States,

was modified by the Confederate constitution. In its final form the wording of the clause in the latter instrument authorized Congress

> to lay and collect taxes, duties, imposts and excises, for revenue necessary to pay the debts, provide for the common defence, and carry on the government of the Confederate States.

It is to be noted that besides omitting the general welfare clause, this wording once for all put at rest the controversy as to whether the taxing power and the power to provide for the common defence and carry on the government were granted as two distinct powers, or whether the latter was merely a qualification of the former. The clause, however, bears on the legal tender question only as an illustration of the strict-constructionist views prevalent in the Confederacy.

I find the first reference to an agitation in favor of a legal tender act in a letter of E. J. Forstall to Duncan F. Kenner, chairman of the ways and means committee, dated July 8, 1861. The writer says: "A plan is now agitating making treasury notes a legal tender. This would be bankruptcy to begin with, the destruction of public and private credit and of all confidence between man and man." He then cites the his-

[1] Federal Constitution, art. 1, sec. 8, cl. 2, 5, 11–16, 18. Confederate Provisional Constitution, art. 1, sec. 6, cl. 2, 5, 11–16, 17. Confederate Permanent Constitution, art. 1, sec. 8, cl. 2, 5, 11–16, 18.

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tory of the Continental currency and of the French *assignats*, which has been so often repeated in legal tender discussions. John P. Richardson, ex-governor of South Carolina, writing to the secretary of the treasury on July 10, 1861, points out the great temptation to declare the treasury notes a legal tender, as a means of helping the government in its purchase of supplies, but he calls attention to the wise constitutional prohibition, which ought under no circumstances to be violated. James D. Denègre, president of the Citizens' Bank of New Orleans, whose advice was always welcomed by the Treasury Department, was also opposed to the passage of such an act, holding that it would be neither "wise, prudent nor politic." [1]

There were others, however, who thought differently and who demanded on one plea or another the passage of a legal tender law.[2] Petitions to this effect began to be presented to the provisional government. The Congress took up the matter on July 19, 1861, and on motion of A. H. Garland, of Arkansas, instructed its finance committee to inquire into the expediency and necessity of making the Confederate bonds and treasury notes (under the act of May 16, 1861) a legal tender during the war. A fortnight later James A. Seddon, of Virginia, moved to amend the act of May 16, 1861, so as to make treasury notes receivable in payment of any debt due to corporations or individuals, but the motion was lost. No other motion of this kind seems to have been made in the provisional Congress, and the question was not taken up again till the first session of the permanent Congress (February 18 to April 21, 1862).

During the first year of the Confederacy, ending with February 17, 1862, the question of legal tender had hardly become very pressing. $31,186,445 had been realized by the sale of bonds, and $95,795,250 in treasury notes had been issued; the latter were quoted at par with gold till April, 1861, and then slowly declined in value, gold being quoted at 120 by the end of the year. So far the difficulties of the financial situation had not been insuperable, and the arguments for a legal tender act

[1] Denègre to Memminger, July 21, 1861.

[2] *Cf.* Wm. C. Smedes, of Vicksburg, to President Davis, July 10, 1861.

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were not as seriously considered as in the following year when the situation had changed.

During the provisional Congress the necessity and constitutionality of a legal tender act had been urged by P. H. Skipwith, of Louisiana, in a letter to Secretary Memminger dated July 19, 1861. He based his belief in the constitutionality of such an act on the clause of the constitution which conferred upon the Congress the power to enact all laws necessary and proper to carry into execution the expressly granted power of declaring war and supporting armies. The argument of implied powers appears here for the first time. Its importance in the Federal Congress in January and February, 1862, is familiar to all.[1] The chief point of the argument was that the constitution could not consistently grant to Congress the power to wage war, and at the same time deprive it of the most efficient tool for the purpose, — one that had so often been used by other nations in a similar situation. The constitutionality of a possible legal tender act first came up in the permanent Congress of the Confederacy on February 25, 1862, the date of the passage of the Federal legal tender act. On motion of Joseph B. Heiskell, of Tennessee, the question was referred to the House judiciary committee. On March 4 another bill of the same kind was referred to the same committee, which made a non-committal report March 29. In the mean time the Senate had been busy with legal tender bills. One introduced early in the session was reported unfavorably by the finance committee March 13. The members of the committee were Barnwell of South Carolina; Hunter of Virginia; Davis of North Carolina; Simms of Kentucky and Henry of Tennessee. On the following day Semmes of Louisiana introduced a substitute bill, which was discussed in the Senate March 21–25, but was not acted on before the end of the session.

The continued discussion of the legal tender acts in the first session of the first permanent Congress aroused the newspapers to take sides for or against such measures. The *Richmond*

[1] *Cf.* Congressional Globe, 37th Congress, 2d session, p. 679, Feb. 6, 1862; *N. Y. Times* (editorial), Jan. 27, 1862.

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Dispatch and the *Richmond Whig* favored a legal tender act as a war measure,[1] the *Charleston Mercury*[2] opposed it as inexpedient. The pressure brought to bear on the Congress by the friends of the policy was very great. A legal tender act was extolled as the only means of sustaining the government's credit, and as an accommodation to the loyal and a check to the disloyal. This appeal to patriotism reminds one forcibly of the speeches on the corresponding occasion in the Federal Congress in February, 1862.

At the beginning of the next session of the Confederate Congress, on August 18, 1862, Representative L. J. Gartrell, of Georgia, introduced a bill to make treasury notes a legal tender in payment of all debts. The bill was as usual referred to the judiciary committee and was reported against by that body a month later (September 30, 1862). Henry S. Foote, of Tennessee, who is mentioned as representing the opposition to President Davis,[3] was one of the champions of the legal tender cause, and made a number of unsuccessful efforts to introduce the principle into various acts by proviso.[4] On the last day of the session, October 13, Representative Thomas J. Porter, of Alabama, offered another bill making treasury notes a legal tender, with heavy penalties upon refusal to accept them. The session closed, however, without any action in the matter.

In the following session, on January 14, 1863, William G. Swan, of Tennessee, introduced a bill in the House authorizing an issue of $250,000,000 in treasury notes in denominations of one dollar and upwards, to be receivable in payment of all debts. A few days later[5] Francis S. Lyon, of Alabama, offered a resolution authorizing the President to induce the state legislatures to enact laws making all debts thereafter contracted payable in Confederate notes. These and all other legal tender bills were buried in the judiciary committee,[6] and the matter rested there for some months.

[1] *Richmond Dispatch* (editorial), April 11, 1862; *Richmond Whig* (editorial), Sept. 6, 1862.
[2] Editorial, April 10, 1862.
[3] E. A. Pollard, *The Galaxy*, 6, 757 (N. Y. Dec. 1868).
[4] Confederate House Journal, Oct. 6 and 8, 1862.
[5] *Ibid.* Jan. 17, 1863.
[6] *Ibid.* Feb. 5, 1863.

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The financial difficulties of 1862 tried to its utmost the strength of the Congressional opposition to a legal tender act. The capture of New Orleans gave a new aspect to the war. During the six months ending August 18, 1862, $114,984,320 in treasury notes had been issued and $214,310,565 more were emitted before the end of the year. On August 11, $206,044,035 in notes were outstanding, over $180,000,000 of which did not bear interest. By the end of the year the amount outstanding had risen to $410,629,692.

The paper money craze had become wide-spread. The states had issued large amounts of treasury notes, mostly in small denominations, and evidently designed to take the place of the fractional coins, which had disappeared from circulation and had not yet been replaced by Confederate fractional paper currency. Counties, cities, railway and manufacturing corporations and individuals had joined the movement by issuing and circulating their notes. The banks had immensely extended their note issues, under authority readily granted by the state legislatures, while large numbers of new banks of issue had been chartered. As a consequence of this inflation of the currency prices had risen enormously. By December, 1862, wheat in Richmond was selling at four dollars, corn at three dollars, oats at two dollars per bushel, and flour at $20 to $25 per barrel. Gold was quoted at 250 in September. In the face of these facts it is not surprising that certain classes demanded the passage of a legal tender law. The government was being plunged into ever deeper difficulties, and many urged that a legal tender law was the only means of rescuing it from certain and immediate ruin.

There can be no reasonable doubt that it was the Confederate constitution, as interpreted by the majority in the Congress, which mainly prevented the adoption of such a measure. A correspondent of the *Richmond Enquirer*[1] suggested a constitutional amendment to legalize the issue of legal tender notes, but so far as I know the suggestion was not seriously considered. Those who favored a legal tender act either held that such a

[1] *Richmond Enquirer*, Jan. 20, 1863.

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measure was distinctly constitutional, or else waived the point of constitutionality and demanded its passage as a war measure. Some based its constitutionality on the power granted the Congress to coin money and regulate its value,[1]—an argument which, when offered in the Federal Congress nine months before, had been almost ridiculed. Another plea for its constitutionality was one that had carried much weight in the Federal Congress. This argument, as stated by the *Richmond Whig* of October 6, 1862, hinged on the absence of any constitutional prohibition of the government to make its notes a legal tender, and *per contra* on its implied power to do so.[2] As a matter of fact, however, it is evident that in the demand for legal tender legislation in both North and South in 1862 the constitutionality of the acts was practically waived and their expediency as war measures was emphasized. "Constitutional or not," the measure was urged as necessary to enable the governments to carry on the war.[3] The North was convinced by this argument, the South was not.

The military disasters of the year 1863 greatly increased the financial troubles of the Confederate States. During the first nine months of the year $391,623,530 in treasury notes were issued, which raised the total amount outstanding on September 30, 1863, to above $700,000,000. The currency had experienced a corresponding fall in value. Gold, which had been quoted at about 250 in January, rose to 400 in May, 1000 in August, 1200 in November and 2000 in December. This decline in the value of the currency aroused many appeals for a legal tender law. It was pointed out to Secretary Memminger[4] that the constitution was inconsistent in empowering the Congress to issue treasury notes, which the people generally looked

[1] *Richmond Whig*, Sept. 4, 1862.

[2] *Cf.* Spaulding, of the Federal ways and means committee. Congressional Globe, 37th Congress, 2d session, p. 525, Jan. 28, 1862. I intentionally omit all reference to the arguments which established the constitutionality of the act of Feb. 25, 1862, in the mind of the Federal Supreme Court.

[3] *New York Herald*, Jan. 20, 1862; *New York Times*, Jan. 27, 1862; *Richmond Enquirer*, Aug. 26, 1862; Messrs. Spaulding and Kellogg in the Federal House of Representatives.

[4] A. Miller to Memminger, Nov. 10, 1863.

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upon as money, but in not allowing that body to declare them a legal tender. The constitutionality of the desired measure, however, found few supporters. Senator Brown, of Mississippi, in arguing for a legal tender bill in the Confederate Senate, on December 24, 1863, confessed his doubts on the constitutional question, but urged the passage of the measure on the plea of necessity. He held, indeed, that the constitution contained no prohibition against the Congress, and that only the states were forbidden to "make anything but gold and silver coin a tender in payment of debts"; but in point of fact, his whole argument hinged on the expediency of the bill. The government, he said, had already made the notes practically a legal tender in its transactions; it was compelling its own creditors to receive them; why should not all other creditors be treated in the same way? The opponents of the proposition employed the same constitutional arguments that were used by Mr. Pendleton in the Federal House of Representatives, when the act of February 25, 1862, was under discussion.[1] The *Augusta Daily Constitutionalist* said on November 25, 1863: "Congress has been importuned to make the treasury notes a legal tender, but that body had more regard for the constitution than Lincoln's Congress, and refused every time the bill was up, by overwhelming majorities." The Georgia newspaper held that such an act, besides being unconstitutional, would be a gigantic folly, which would accomplish no good and much harm.[2]

A number of other attempts at legal tender legislation were made during the winter of 1863–64. Senator Phelan's bill, providing that the coupons of certain bonds that were to be issued should be, when due, a legal tender in payment of all debts, was introduced on December 10, 1863, reported adversely by the finance committee on January 25, and finally tabled February 3, 1864. Senator Orr's two bills met a similar fate.[3]

The legal tender question ceased to be discussed by the end of the first Congress (February 18, 1864). The opposition to

[1] Congressional Globe, 37th Congress, 2d Session, p. 549, Jan. 30, 1862.
[2] See also the *Richmond Sentinel*, Jan. 14, 1864.
[3] Confederate Senate Journal, Feb. 9 and 16, 1864.

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a legal tender act, both on the score of its unconstitutionality and of its futility, had been too strong, and no such measure could have been passed, nor was any further attempt made in that direction. Indeed, had a bill been passed, President Davis, it is certain, would have vetoed it. The cessation of the legal tender agitation was in part due to the fact that another plan to remedy the currency disorders had been discovered, which, on trial, for the time being gave satisfaction. I refer to the important act of February 17, 1864,[1] which provided for a reduction of the currency by a forced funding and taxing of the treasury notes. Few took the trouble to argue for the constitutionality of this partial repudiation of the Confederate debt, but those that did so justified the measure by the government's power of taxation.[2]

It is interesting to compare the action of the Congress in passing this repudiation measure with its stubborn refusal to pass any legal tender act. The same Congress which for three years had opposed the latter measure, largely on constitutional grounds, finally passed an act which was equally repugnant to both the spirit and the letter of the constitution,[3] and which, as a war measure, was in the end as futile as a legal tender act would have been. Why should the Congress have refused to invade personal rights and to tamper with contracts by a legal tender act, and still have seen fit to enact a law which on the face of it had a similar effect through the arbitrary reduction of Confederate indebtedness?

The constant opposition of the Confederate law makers to a legal tender act is easily understood when we remember the principle of strict constitutional interpretation which the large majority of them maintained and had maintained before the war. In the North this principle was quickly swept away in the stress of the conflict. In the South it asserted itself and for four trying years prevented the passage of any law making

[1] Laws of the 1st Congress, 4th session, ch. 63: "An act to reduce the currency and to authorize a new issue of notes and bonds."

[2] *Richmond Enquirer*, Oct. 30, Nov. 2, 1863.

[3] Confederate Permanent Constitution, art. i, sec. 8, cl. 4: " . . . no law of Congress shall discharge any debt contracted before the passage of the same."

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the Confederate treasury notes receivable in payment of debts. Not until the expiring days of the Confederacy was the principle at last compromised by the passage of an act on March 18, 1865, making certificates of indebtedness receivable in payment of articles impressed for the government.

We cannot pass by unnoticed the fact that the state legislatures did not remain as true to the constitution as did the Confederate Congress. Besides making the Richmond government's treasury notes receivable for state and local taxes, the state legislatures went much further and in several instances enacted laws which aimed at legalizing the tender of these notes for all debts, private as well as public. In other words, while the Congress hesitated to pass such an act as transcending its delegated powers, the state legislatures passed similar measures in direct violation of the clause in the constitution[1] which forbade a state to make anything but gold and silver coin a tender in payment of debts. An act of Alabama, of December 10, 1861, provided that current bank notes and Confederate bonds and treasury notes must be received when tendered in payment of a judgment. A similar law in Arkansas, of November 18, 1861, made the state bonds and treasury notes a legal tender, thereby also violating the constitutional prohibition of state bills of credit. A Florida law of December 3, 1863, after a long preamble denouncing the mean and selfish persons who discredited Confederate notes, provided that the refusal to accept such currency by any one who was exempt from military service, should terminate the exemption, and that the offender should be immediately placed in service. Georgia, by act of December 14, 1863, provided that in addition to the taxpayer's usual oath he must swear as to whether he had or had not refused Confederate notes in payment of any claims due him. An act making these notes receivable for taxes by the state was vetoed by the governor on December 15, 1863,[2] partly on the ground that it violated the clause of the Confederate constitution which forbade the states to make anything but coin a legal tender.

[1] Confederate Provisional Constitution art. i, sec. 8, cl. 1; Permanent Constitution art. i, sec. 10, cl. 1.

[2] *Savannah Daily Morning News*, Dec. 25, 1863.

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These examples are sufficient to illustrate the difference between the attitude of the state legislatures and that of the Congress.

I have aimed to bring out the characteristic features of the legal tender movement in the South during the war, the identity of the Federal and Confederate arguments for and against a legal tender act, and the different results of the agitation in the two sections. A closer examination of this parallel movement would establish the fact that during the war the constitutionality of a law making government notes a legal tender in payment of all public and private debts was never satisfactorily established either in the North or in the South. What results constitutional interpretation has reached since the war, has no bearing on the question. The Northerners and Southerners who favored a legal tender act during the Civil War did so primarily in the belief that the war could not be carried on without it.

3. *National Bank System.*

The banking policy of the South during the war forms an important chapter in the financial history of the Confederate States. That history is incomplete without a sketch of the help the banks gave to the government, especially at the beginning of the war, and of the part the state banking laws played in the currency legislation of the period. While leaving this general field untouched, I wish to call attention in particular to the abortive movement in the South which paralleled the successful Northern movement that resulted in the Federal national bank system as established by the act of February 25, 1863.

As was said above, the Southern banks were influenced by the paper money craze, and having suspended specie payment, they found no difficulty in obtaining the necessary authority from the state legislatures to enlarge their note issues,[1] the laws often limiting the issue to twice the amount of the bank's capital. It was soon felt that these bank notes were competing with the Con-

[1] Typical acts were those of Florida, Feb. 14, 1861; North Carolina, Feb. 25, 1861; Mississippi, Jan. 17, 1862; Louisiana, Jan. 20, 1862; Georgia, Dec. 13, 1862.

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federate treasury notes and depressing the value of the latter as currency.[1] As compared with Confederate notes, the Virginia bank notes were quoted at 1 : 2⅓ in March, 1863, 1 : 5 in July, 1863, and 1 : 7 in February and November, 1864. Under these circumstances the idea was often suggested of establishing some kind of Confederate national bank or banks, which might improve the currency and at the same time furnish a market for the government bonds. A correspondent of the Treasury Department suggested a bank on the plan of the Bank of England. Thirteen states were to subscribe $1,000,000 each, and a further $1,000,000 was to be sold to private shareholders. With this paid up capital of $14,000,000 he hoped successfully to circulate from twenty-five to forty millions in bank notes.[2] Later in the year a correspondent of the *Richmond Whig* (November 27, 1861) proposed the incorporation by the Congress of a joint stock bank with a paid up capital of $10,000,000, to be invested in Confederate bonds and to serve as a basis for the issue of an equal amount of bank notes, redeemable one year after the ratification of peace, and countersigned by the government. An additional $10,000,000 in these notes were to be issued upon the deposit with the government of a like amount of produce certificates, — a particular kind of Confederate bond. In February, 1862, a system of free banking was suggested, after the model of the familiar system in New York.[3] The states were to authorize the banks to issue notes on depositing with the state governments one-half of their paid up capital in state or Confederate bonds. The government was to countersign the notes, and in case the banks failed to redeem them, a sufficient number of the bonds were to be sold for the purpose. At the time this suggestion was made Confederate and state bonds were selling at par in currency, or at 80 in specie. How the currency could be improved by an issue of bank notes based on bonds which were declining in value was not explained.

[1] *Richmond Examiner*, Nov. 9, 1861; *Richmond Dispatch*, Sept. 9, 1863.

[2] W. Murdock to Memminger, April 18, 1861. *Cf. Augusta Daily Constitutionalist*, Feb. 9, 1864. For a similar suggestion see W. Yerger to Congressman W. P. Harris, July 14, 1861. *Cf. Richmond Dispatch*, Oct. 28, 1861.

[3] *Richmond Whig* (letter), Feb. 19, 1862.

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Almost the identical suggestion was made by Duff Green two years later,[1] at a time when Confederate eight per cent registered bonds were selling at $7.40 in specie, six per cent and seven per cent bonds at five dollars, Virginia six per cent registered bonds at twelve dollars and coupon bonds at twenty-four dollars in specie, the face value in each case being $100.

Other similar plans were offered in which everything hinged on the government's credit, but with one exception no attempt was made to carry them out. This exception occurred during the last days of the Confederacy. On February 25, 1865, an act was passed establishing offices of deposit in connection with the Confederate Treasury. These offices, to be established throughout the South, were to receive on deposit, from all persons offering them, current funds and drafts on the Treasury Department, and were to pay out on checks drawn by the depositors. No interest was to be paid on deposits, which were guaranteed by the "government's faith." How high the latter was rated at the time may be seen from the fact that on March 11 a $500 bond sold for six dollars in specie. The government was allowed by the act to borrow under certain regulations from the deposit offices up to two-thirds of the amount of deposits. Furthermore, depositors were encouraged by an offer to remit one-half the tax on treasury notes and bonds in the case of deposits of more than three months. How successful the scheme was, or whether it was ever put into practice, I do not know.

While the Confederate Congress never took the necessary step to establish a banking system in which the bank notes should be secured by a deposit of government bonds, various state legislatures adopted such a measure. Thus an act of Alabama of December 9, 1861, authorized a savings bank at Mobile to deposit Confederate or state bonds with the state comptroller and to issue notes in denominations of one dollar and over to the extent of twice the face value of the bonds deposited. The bank's shareholders were made liable for double the amount of their stock. If the bank failed to redeem its notes in specie, the comptroller was empowered to sell the

[1] *Richmond Enquirer*, Jan. 16, 1864.

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bonds he held and then to call on the shareholders. A more effective scheme was adopted in Georgia.[1] The Cotton Planter's Bank of Thomasville was incorporated in 1861 with a capital of $3,000,000, which was to be subscribed in Confederate or state bonds or in cotton at thirty dollars a bale. The bank was authorized to issue notes, dollar for dollar, upon such bonds or cotton. In the following year there was some talk of extending the system,[2] which it was thought would raise the price of Confederate bonds, then selling at forty dollars in specie; but the state legislature acted differently, and amended the Thomasville bank's charter[3] so as to authorize its issuing notes up to three times the amount of paid up capital, thus practically reversing the former policy.

In Virginia a similar attempt to secure the bank notes was made on a larger scale. In this state numerous banks had been chartered after 1851, under laws which were modelled upon the New York free banking system. Under these laws a bank deposited with the state treasurer state bonds or internal improvement companies' bonds guaranteed by the state and bearing six per cent interest. The amount of deposit was limited by the amount of capital. The banks then issued notes in denominations of five dollars and above, up to the full amount of the bonds deposited, in some cases up to the market value, but not above the face value. The notes were expressly "secured by pledge of state securities" and were countersigned by the treasurer. This state official exchanged worn and mutilated notes for new ones. In case a bank was unable or unwilling to redeem its notes, he sold the bonds and applied the proceeds to their redemption. A cash reserve in specie equal to one-fifth of the outstanding notes was required. When the reserve was reduced below that figure, the bank ceased discounting and loaning until the minimum was again reached. Finally a bank could retire its note circulation by redeeming with its notes the bonds which it had on deposit in the state treasury, the notes being then cancelled. By extending the

[1] Act of Dec. 14, 1861. [2] *Richmond Examiner*, Oct. 10, 1862.
[3] Act of Dec. 13, 1862.

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bank charters which were about to expire in 1861, this system of secured bank notes was strengthened and it had an important influence upon the currency during the war. The system was somewhat modified by the Virginia act of March 29, 1862, which authorized the issue of a limited amount of unsecured bank notes of small denominations. Notwithstanding this modification, the system must have had an influence on the standing of Virginia bank notes, which all through the war were quoted at a less discount in gold than the bank notes of other states, and, of course, at a far less discount than the Confederate treasury notes.

The absence of any serious attempt to introduce a Confederate national bank system on lines similar to those of the Federal system, finds an easy explanation in the rapid decline of the Confederate bonds, on which a possible bank note issue would have been based. The eight per cent bonds of the $15,000,000 loan act of February 28, 1861, were quoted at eighty in specie in March, 1862, at thirty to thirty-four in April, 1862, at twenty-five in July, 1863, at seven to nine in December, 1863, at five to six in September, 1864, and later at a still lower figure. The eight per cent bonds of the $100,000,000 loan act of August 19, 1861, fared still worse. The credit of the Confederate government was never sufficient to furnish a basis on which to erect a banking system. Then, too, the government felt that any attempt to improve the bank note currency would react upon the treasury notes and depress them still more. The banks were regarded as the greatest foes of the government paper money, and any measure that would strengthen them in their opposition was out of the question.

The above is but a sketch of three phases in the financial history of the Confederate states. Enough has been said to point out the importance of the financial policy of the South, especially when compared with the policy of the North during the war. A study of Southern history during that disastrous, but interesting period, teaches uncommonly suggestive lessons in matters of currency, banking and public finance.

J. C. Schwab.

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IRISH LAND LEGISLATION SINCE 1845. I.

IN the year 1843, Ireland was entirely under the sway of Daniel O'Connell and the Repeal Association, and the functions of the lawful government were practically suspended. Among the sources of discontent which had contributed to produce this situation, the relations of landlord and tenant were recognized as having played an important part. In October, the government broke by brute force the power of O'Connell; but previously to that, in the House of Commons, the prime minister, Sir Robert Peel, had prepared the way for this action by announcing his readiness to consider some of the chief complaints of the Irish people, among them the relations of landholders and tenants. A royal commission was appointed, under the presidency of the Earl of Devon, to report on the law and practice in reference to land tenure in Ireland, with suggestions of any desirable amendments in existing law. With the report of this commission, submitted in 1845, the land question assumed a distinct position in Irish politics which has grown steadily in importance to the present day.

I. *The Situation in* 1845.

The poverty and wretchedness of Ireland's agricultural population had been familiar facts from even earlier than the time of Swift's *Modest Proposal.* Since the accession of George III secret organizations for agrarian outrage and insurrection had followed one another in unbroken succession. In the view of the English governing class, still enveloped in prejudices of the seventeenth century, the misery of the Irish was due solely to their inherent shiftlessness, the frequent outrage and rebellion to their ineradicable depravity. In 1801 the care of Irish affairs fell more directly into the hands of the British through the Act of Union. From that date laws conferring extraordinary

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powers for the suppression of crime had been numerous; laws for ameliorating the condition of the peasant's lot had been almost unknown. On a number of occasions, in times of exceptional and wide-spread distress, select committees had reported on special phases of the situation. The intensity of the wretchedness was emphasized by all, but the remedies suggested had been in general on other lines than that of modification in the legal relations of landlord and tenant. Encouragement to the reclamation of waste land, emigration and other means of relief from the evils of a redundant population were the measures most favorably mentioned, but even these had rarely received the sanction of law.[1]

The importance of the Devon Commission's report lies in the extraordinary thoroughness of the investigation upon which it was based, and in the attention which it paid to the legal as contrasted with the economic side of the land question. The commissioners were all landlords, and the distrust with which the Irish regarded them is perfectly expressed in the comment of O'Connell: "You might as well consult butchers about keeping Lent as consult these men about the rights of farmers."[2] Nevertheless, the Irish agitator himself could not have contributed more to his cause than did these landlords, when they made most prominent in current discussion the moral and legal rights of the tenant farmer instead of his social and economic delinquencies. As the victim of injustice in property rights he could appeal far more effectively to British sentiment than as the victim of his own incompetence in agriculture and his own shiftless neglect of the Malthusian law.

The census of 1841 showed that of the 1,472,739 families in Ireland, over 1,200,000 lived outside of towns numbering 2000 inhabitants, and of this rural population 491,809 families occupied mud cabins of but one room.[3] Sixty-six per cent of the total population were engaged chiefly in agriculture, and sixty-

[1] For a review of previous reports, see Devon Commission's Report, Parliamentary Papers for 1845, vol. xix, p. 8 *et seq.*

[2] Shaw Lefevre, Peel and O'Connell, p. 234.

[3] Parliamentary Papers, 1843, vol. xxiv, p. xiv *et seq.*

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eight per cent of the rural element had no means of support other than their own manual labor. In this last class are included all so-called "farmers" on holdings of less than five acres. These figures are eloquent as to the social conditions which the Devon Commission had to confront. Its first general conclusion was that an increased and improved cultivation of the soil was the most important requisite for the improvement of the people. A tendency to such improvement seemed to the commissioners to exist among the farmer class; but the great mass of agricultural laborers were considered to have no prospects of bettering their condition. The commission in its report then took up and considered in order the chief subjects of complaint and controversy in connection with the occupation of land. A summary of its discussion will furnish the best possible basis for the later history of the question.

First, as to tenure. The commission investigated particularly, in the first place, the general character of the landlords' interest in their land, and found a source of many evils in the extent to which the nominal proprietors were hampered by family settlements and other burdens imposed upon the land by former owners. As to occupiers' tenure, the custom of the Ulster counties known as "tenant right" was considered the most striking phenomenon. According to this custom, a tenant, upon leaving his holding for whatever cause, claimed the privilege of exacting from his successor a sum of money running up to ten or fifteen years' rent. Practically the tenant sold his right of occupancy, subject only to the landlord's approval of the purchaser and of the amount paid. From this custom, the commission declared, a feeling of proprietorship had grown up in the tenants which was wholly anomalous in reference to ordinary notions of property. Much danger to "the just rights of property" was anticipated from the extension of this "tenant right," though in a modified form its results seemed beneficial. Apart from this particular custom, most of the land in Ireland was occupied under terminable leases or by tenants from year to year. Leases in general appeared to be unpopular and the majority of occupiers were essentially tenants at will. The "want of

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tenure" was the most general topic of complaint to the commission in all parts of Ireland, and the commissioners were convinced that in many instances it was a fatal impediment to improvement.[1]

Second, as to improvements. It was pointed out under this head, as an important but unfamiliar fact, that in Ireland this word was employed to denote dwelling-houses, farm buildings and even the making of fences. "These necessary adjuncts of a farm, without which, in England or Scotland, no tenant would be found to rent it,"[2] were in Ireland all contributed by the tenants. This fact, taken in connection with the general uncertainty of tenure, made apparently a most profound impression upon the commission.

Third, as to consolidation of farms. For twenty-five years, at least, the movement in this direction had been a conspicuous feature of agricultural history in Ireland. Its causes were partly economic, partly political. The fruits it had borne were most conspicuous in the annals of poor relief and of agrarian crime. Select committees had already recognized the "clearance" system as a most prolific source of disturbance among the Irish peasantry, but had endorsed the landlord's plea that it was only the painful remedy of a more painful disease; that sub-division and over-population of the land had extended to a point that was unendurable. Standing on the "just rights of property," the landlords had reformed the agricultural system. Standing on an assumed right to live, the evicted tenantry had organized Ribbon societies and shot the landlords. The Devon Commission considered that the recent instances of consolidation had been comparatively few, and that the landlord's motive in the matter was in general to increase the size of the holdings, with a view to better cultivation of the land. While admitting the misery entailed by clearances on thickly peopled estates, the commission could suggest no remedy other than humane procedure on the part of the landlords.

[1] For ten years past Mr. Sharman Crawford had been calling attention, both in and out of Parliament, to the connection between the uncertainty of the tenant's occupancy and his disinclination to improve his holding. [2] Report, p. 16.

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Fourth, as to recovery of rent. The methods of procedure open to the owner against a defaulting tenant were practically two: distress and action for ejectment. Both were subjects of incessant complaint on the part of the tenantry. It was asserted that the legislation regulating the matter had been enacted solely in the interest of the landlords. Distress had been made a more effective instrument than it was originally, by statutes giving the landlord the right to sell the goods seized, and also the right to seize growing crops.[1] Ejectment, originally available only through expensive proceedings and in case of a lease containing a clause of re-entry, had been by successive laws made cheap and of much wider application, especially in tenancies where the rent did not exceed £50 annually.[2] The commissioners believed that neither of these remedies could be abolished without injury to "the just rights of property." Some modifications in the laws were suggested, however, notably the abolition of the right to distrain growing crops.

Fifth, as to the sale of estates. It was believed by the commission that there was a large number of people in Ireland able and willing to become landowners on a small scale, if an opportunity were given. The desirability of such an addition to the proprietorship of the island was unquestionable. But an insuperable obstacle was the fact that estates were so generally encumbered by family settlements and otherwise, that dividing and selling them piecemeal was a hopelessly difficult and expensive task.

Sixth, as to agricultural laborers. This was the most numerous and the most wretched class of the population. Lack of employment seemed to be the fundamental source of their misery. The custom of conacre — letting a small piece of land for one or two crops only — was the subject of general condemnation by all men acquainted with its effects both upon the laborers and the land. But the commissioners thought that it was almost essential to the existence of the laborer. Unable either to take a permanent holding or to live on his wages, he obtained

[1] Montgomery, Land Tenure in Ireland (Cambridge University Press, 1889), p. 99.
[2] Report of the Devon Commission, p. 23.

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from some farmer by conacre the opportunity of at least raising enough potatoes to keep life in his body. But in general he paid enormously for the privilege, and the commission approved the practice adopted by some landlords of setting aside small allotments, with decent cabins, for the laborers on their estates.

Such were the more conspicuous features of the land question in Ireland in 1845. The Devon Commission was in general quite impartial in its presentation of the facts. In its recommendations it well reflected the general trend of what was then the rather progressive element of English thought. Nothing more clearly shows the character of this thought than the frequent recurrence in the report of the phrase, "the just rights of property," and the repeated refusal, after the presentation of serious evils, to recommend legislative intervention for their removal. The most important of the changes it approved in the laws affecting the occupation of land were as follows:

1. A number of measures designed to facilitate the conversion of uncertain tenancies into leaseholds or proprietorships; *e.g.* the extension of leasing powers to holders for life and to corporations, the reduction of the stamp tax on leases, and legislation to encourage the sale of incumbered estates.

2. Laws looking to the stimulation of improvements: on the landlord's side, by enabling limited owners to charge upon the estate the cost of works calculated to be of permanent value to the property; on the tenant's side, by securing to him the long-sought "compensation for improvements." In reference to this latter subject the commission displayed real earnestness; but this feeling did not lead them to lose sight of the landlord's interest. They would permit, first, the registration of an agreement between landlord and tenant as to the character and cost of the improvements to be made, this to be enforceable in the courts. Second, in case no agreement could be reached, the tenant should be enabled to serve notice of proposed improvements — such as buildings and fences — upon the landlord, and to have their suitableness and maximum cost fixed by arbitrators and the court; then, in case of ejectment or increase of rent, the tenant should be entitled to compensation within the maximum fixed.

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3. The extension of the practice already in vogue, of advancing public funds by way of loan to private persons for agricultural improvements, and to public corporations for useful works.

With the efforts to carry out such moderate recommendations as these, the history of progressive land legislation begins. The time that has elapsed since 1845 may be divided into three pretty clearly marked periods: (1) 1845–1865, during which all legislation in reference to the land question proceeded from the standpoint of the landlord and was governed by the English notions of his absolute ownership; (2) 1865–1885, the years of transition, in which it was sought to give a general legal recognition to the tenants' interest in the land, while still retaining landlords' rights; (3) 1885–1891, in which all attention has been concentrated on the conversion of the tenant into a proprietor.

II. *Legislation based on the Principle of Absolute Ownership by the Landlord.*

This period opens with the demoralizing years of the great famine. Between 1845 and 1850 starvation and disease wrought the most complete social disorganization throughout Ireland. A ghastly but effective solution was reached of many problems incident to over-population. The work begun by hunger and pestilence was carried on by emigration, and landlords and government eagerly stimulated this movement, which was destined to react so unpleasantly on both in the future.

The dreadful incidents of the famine years attracted general attention to the condition of Ireland, and in the discussion of the evils and their remedies, the land question assumed great prominence. To the changes in the actual situation due to death and voluntary emigration, were added those resulting from the policy of consolidation of farms, which many landlords believed themselves justified in adopting. The "clearances" which this consolidation involved furnished an abundant crop of pathetic incidents, and stimulated in a large degree the agitation for tenant right that covered the years from 1850

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to 1854. The net result of all the complications of the famine period was a wide-spread conviction that something must be done in the matter of Irish land law. In determining what line of action should be taken, the suggestions of the Devon Commission were always referred to by both Whig and Tory governments. And of these suggestions, that concerning compensation to tenants for improvements was considered the most promising subject for action.

Throughout the whole period under consideration, an almost uninterrupted series of bills dealing with land law were presented to Parliament by Irish members. These continued, at first, the long familiar demand for compensation for improvements, but after the famine the usual proposal was the recognition and extension of the Ulster tenant right. The government, however, never got beyond the idea of compensation. To realize this idea, bills were brought forward by Sir Robert Peel's ministry in 1845, by Lord Russell's in 1846 and 1848 and by Lord Derby's in 1852. The fundamental principle in each was the absolute property-right of the landlord in his estate. Lord Stanley, in introducing the bill of 1845, took pains expressly to disclaim any intention (1) to give tenants fixity of tenure against the landlord's will, (2) to interfere with the landlord's discretion about granting leases, or (3) to interfere in any way with the amount of rent the landlord might exact.[1] All that was proposed was to secure to the tenant as absolute a right to the capital he invested in improvements as the landlord had to the economic value of his land. But while the owner's power of arbitrary eviction was a standing menace to the tenant's property right in his improvements, it was promptly pointed out that the occupier's power of arbitrary improvement was in equal degree threatening to the landlord's interest in his land. Good landlords as well as bad stood aghast at the results that would ensue, if every ignorant tenant of a five-acre plot should have by law the right to work out his conception of "improving" the holding and then to charge the landlord for it. The abstract justice of compensation was not

[1] Hansard, 3d series, vol. lxxxi, p. 221.

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disputed, but the determination of what should constitute an improvement was a vexatious matter.

In meeting this difficulty two methods were employed in the various government propositions: first, the enumeration and definition of works for which compensation could be claimed; second, the institution of machinery for determining the beneficial character of the enumerated works in each particular instance. The bill of 1845 enumerated but three improvements, buildings, drainage and the levelling of "fences";[1] that of 1846 was confined to the first two of these;[2] that of 1852 added the reclamation of waste land, the clearing away of rocks and the building of fences.[3] For determining the utility of proposed improvements Stanley's bill in 1845 provided a government office, headed by a commissioner of improvements, whose approval of the work done would entitle the tenant to compensation. It was this provision that killed the bill. The most violent protests came from the Lords against such interference with the rights of property.[4] It would enable an occupier and a government official to make alterations in a landlord's estate without the owner's consent, and then, in addition, make him pay for the injury. This was sheer confiscation. Lord Stanley protested that the object was merely to get a cheap and impartial tribunal to fix the compensation, and asked if the landlords would be better satisfied to leave their case to a local jury.[5] But though the bill passed its second reading in the Lords, it was sent to a select committee, whence it never came forth.[6] The Earl of Lincoln's bill (1846) provided first for a voluntary agreement between tenant and owner, securing compensation or increased rent according as the improvement was effected by the one or the other; and second for "compulsory agreement,"

[1] These were the great earth banks characteristic of some parts of Ireland even at the present day. Stanley estimated that they occupied generally about twenty per cent of the land in each farm, and did not prevent the ingress or egress of any living being. Hansard, vol. lxxxi, p. 223.

[2] British Parliamentary Papers, 1846, vol. ii, Landlord and Tenant (Ireland).

[3] *Ibid.* 1852–53, vol. viii, Tenants' Improvements Compensation (Ireland).

[4] See protest of thirty-six peers owning land in Ireland. Hansard, vol. lxxxi, p. 1119.

[5] Hansard, vol. lxxxi, p. 1142 *et seq.*

[6] *Ibid.* vol. lxxxii, p. 493.

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under which, at the tenant's instance, the suitableness of proposed alterations should be decided by arbitration. Here the court was brought in to appoint an arbitrator to represent the landlord, if the latter refused to name one. Sir William Somerville's proposition (1848), as originally submitted, contained the arbitration scheme, to which a select committee added Stanley's government commissioner as a resource in case the arbitrators failed to agree.

It was evident after the discussion of these bills that the vaunted principle of compensation for improvements was not so easy of application as had been supposed. The originators of the idea had intended simply to assure to the tenant the power to cultivate his holding in the most effective way without suffering ultimate loss. With the complicated machinery which tenderness for the landlord's rights made inevitable, the friends of the tenant felt that all stimulus to improvement was lost. Their attention was diverted to projects for legalizing and extending the Ulster custom which had figured so extensively in the Devon Commission's report, while the landlord interest turned to a consideration of measures to facilitate improvement by the owners themselves. By 1852, the tenant-right agitation had attained such headway that Lord Derby's government undertook to check it by a wide scheme of land-law reform. One feature of this scheme was Napier's compensation for improvements bill. In this, however, the vital question of landlord's rights found no new solution; Stanley's government commissioner was again the ultimate authority as to the suitableness of the improvement, and the same elaborate processes of notification and inspection and registration were inserted to paralyze the progressive cultivator. There were some new provisions more favorable to the tenant, in particular one that brought past as well as future improvements within the scope of compensation. That was in the landlords' eyes confiscation absolute,[1] but some concession had to be made to the threatening spectre of tenant right. Lord Derby's government

[1] Mr. Napier complained bitterly in the House that he had been charged with communistic principles. Hansard, vol. cxxiii, p. 1544.

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fell, however, before the measure could obtain complete legislative action, and under the new administration the compensation bill was thrown out by a Lords' committee.[1] Not till 1860 was the idea of compensation for tenants' improvements again taken up by the government. In that year, in the midst of an act offering incentives to owners to improve, provisions were inserted which affected the tenants also.[2] For certain enumerated works, undertaken with the consent of the landlord, agricultural occupiers were given an annuity of $7\frac{1}{10}$ per cent on their outlay, to be collectible, however, only in case of eviction, and then to run for the unexpired part of a term of twenty-five years from the date of the expenditure. Such was the result of twenty-five years of struggle for tenants' compensation. The landlord's conception of his interest in the soil remained intact. His consent must be obtained for any alteration on his estate, his power of arbitrary eviction remained unaffected, his liability to the tenant ceased with a fixed term, and all past improvements were left absolutely his. Against each of these principles the friends of the tenants' cause had for years been committed to uncompromising hostility. Mr. Cardwell, who had charge of the bill, defended it only on the ground that any more sweeping reform was hopeless of success.[3]

But while this rather inadequate result had been reached in providing a stimulus to the tenants to improve, the recommendations of the Devon Commission in reference to facilitating improvements by the landlords had been more fruitful. The report had dwelt especially upon the importance, first, of enabling limited proprietors to charge permanent improvements upon the estate; and second, of providing some practicable means by which owners whose estates were hopelessly burdened by incumbrances might dispose of their land to purchasers who could with a clear title devote capital to improvements. A bill designed to carry out the latter suggestion was passed with little opposition in 1848,

[1] Hansard, vol. cxxxiii, p. 516. The Lords passed a Landlord and Tenant Bill containing a clause granting compensation for buildings, but it was dropped by the government in the House of Commons. Hansard, vol. cxxxv, p. 196.

[2] 23 and 24 Vict. c. 153.

[3] Hansard, vol. clvii, p. 1553 *et seq.*

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and is known as the Incumbered Estates Act.[1] A cheap and simple process was provided by which, under the oversight of the Court of Chancery, a burdened estate could be sold and the money apportioned among those having interests in it. To the purchaser was given a Parliamentary title.[2] It was expected that by this act a large body of new landlords would be introduced into Ireland, and that these, being provided with sufficient capital and sufficient progressiveness, would make a decided change in the general agricultural situation. The first of these expectations was fulfilled;[3] as to the second, there has been much controversy.

But by far the most ambitious attempt to settle the land question from the standpoint of the landlord was that expressed in the two acts of 1860. The first of these, commonly known as Cardwell's Act,[4] dealt with the whole question of improvements under three heads — landlords' improvements, leasing powers and tenants' improvements. The last of these I have just described. The first part carried out the recommendation of the Devon Commission in reference to limited owners. Under the sanction of the Landed Estates Court, such owners were authorized to make specified improvements and to become entitled by such action to an annuity of $7\frac{1}{10}$ per cent for twenty-five years, chargeable upon the estate. An elaborate machinery of notification, registration and official sanction was provided to protect the interests of the successor. The part of the act relating to leasing powers was also devised in accordance with a recommendation of the Devon Commission. Encouragement to leases had long been a favorite proposition with those who wished to remedy the evils of the yearly tenancies which were characteristic of Ireland. By Cardwell's Act various limited owners, including public and private corporations, were authorized to grant leases, to be distinguished as agricultural, improvement and building leases. The improvement lease bound

[1] 11 and 12 Vict. c. 48.

[2] For a statement of the objects and provisions of the bill, see Hansard, vol. c, p. 94.

[3] By April 1, 1853, 2811 conveyances had been executed under this act, involving an investment of £8,790,917. British Parliamentary Papers, 1852–53, vol. xciv.

[4] 23 and 24 Vict. c. 153.

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the lessor to effect specified agricultural improvements in his occupancy, and the building lease required the erection of certain structures. Here, as in the other parts of the bill, the supervision of the courts was made very complete, in order to protect the interests of the estate.

The other law of 1860 dealing with the land question was that known as Deasy's Act.[1] The Devon Commission and many persons since its time had pointed out the great confusion that existed in the whole subject of land law in Ireland. A consolidation act had been one of the features of Lord Derby's scheme in 1852. Since the great transformation wrought by the famine, and especially under the successful workings of the Incumbered Estates Act, it had become a common idea that a simplification of legal relations was all that was needed to make Ireland happy. Brush away, it was said, all the relics of feudal conceptions that complicate the status of both landlord and tenant, and let everything stand on the simple basis of definite agreement between the owner and the cultivator of the soil.[2] The new proprietors who had become possessed of 2,000,000 acres of Irish land were chiefly Irish capitalists,[3] who were animated by the purpose to make the most out of their investments. Their business instincts, if allowed full play by law, would do more for the agricultural development of Ireland than would ever be possible under the restrictions of the existing system. In accordance with this line of reasoning, Deasy's Act was based on the explicit declaration that

> The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such a relation, which shall be deemed to exist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of rent.[4]

It was in the spirit of this clause that the whole code was

[1] An Act to Consolidate and Amend the Law of Landlord and Tenant in Ireland. 23 and 24 Vict. c. 154. Sometimes also known as Cardwell's Act.

[2] This reasoning appears frequently in the debates on Napier's bills in 1852–54. *Cf.* Hansard, vol. cxxxi, p. 7, 18 *et passim.*

[3] Hansard, vol. clvii, p. 1556.

[4] 23 and 24 Vict. c. 154, sec. 3.

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drawn up and the existing law amended. At the instance of Irish members some clauses were inserted giving the tenant the right to remove agricultural fixtures at the end of his tenancy,[1] and certain limitations were put upon the remedy of distress against the tenant for rent. In general, however, amendments to existing law were favorable to the absolute right of property in land,[2] and to the most perfect facilities for its transfer.

For some five years after the legislation of 1860, little was heard of the land question — far too little, indeed, to betoken the success of the acts. By 1865, their failure to effect any real improvement in agricultural conditions became pronounced. Irish agitation was making itself manifest in the widespread activity of the Fenians, and the self-introspection to which conscientious Britons devote themselves at the periodical revivals of discontent in the sister island revealed the hopeless insufficiency of their ideas as to land legislation. The landlords'-improvements sections of Cardwell's Act had been invoked in but two cases in three years;[3] the provisions for tenants' improvements, in but one case. The carefully arranged stimulus to leases had produced, so far as statistics were available, nine leases. As to Deasy's Act, it was reported that the net result had been, by the simplification of procedure, to make ejectment more common, and so to contribute much to the greatest of all evils — insecurity of tenure. The new landlords with business instincts, from whom so much had been expected, had displayed these instincts in a way most disastrous to the interests of the tenants. Business instincts are only satisfied with large returns for investments, and the search for such returns had resulted in ejectments without mercy and in wholesale confiscation of tenants' improvements. As was stated before a select committee, the new landlords "were men who had not the old traditions of negligence and indulgence combined."[4]

[1] Hansard, vol. clx, p. 271.

[2] For a good discussion of this act in all its bearings, see Montgomery, Land Tenure in Ireland, chapter ix.

[3] Report on the Landlord and Tenant Question in Ireland, by W. Neilson Hancock, LL.D. Parliamentary Papers, 1868–69, vol. xxvi.

[4] Reports of Committees, 1865, vol. xi.

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Lengthy explanations as to why the land acts had failed were abundant. The complicated machinery of their operation had to bear most of the blame. The period of renewed discussion that now began was to result in legislation based on new principles rather than improved machinery.

III. *Legislation recognizing the Possessory Right of the Tenant.*

In 1865 came the first official announcement that a great conspiracy existed among Irishmen to secure the independence of their fatherland. While British dominion in Ireland was never in any real danger from this conspiracy, the very extensive membership of the Fenian organization was an effective stimulus to the consideration of Irish grievances. From 1865 to 1868 Ireland grew steadily in prominence as a subject of political debate, and in the last of these years practically excluded every other topic.[1] The Irish members in Parliament pointed out as leading grievances the position of the established church and the relations of landlord and tenant.[2] Mr. Gladstone, then just ripe for party leadership, with the politician's instinct took up the church question first, and by means of it scored his first decisive victory over Disraeli in 1868. With the disestablishment of the Irish church in the following year, the way was cleared for the settlement of the land question under the same leadership.

In the interval between 1865 and 1869 propositions relating to this question had been a regular feature of every session of Parliament. Mr. Chichester Fortescue, chief secretary for Ireland in Earl Russell's ministry, brought in a bill designed to infuse some vitality into the act of 1860. So far as the tenant's compensation for improvements was concerned, this proposition went back to the old idea of a government official to determine the amount, which was to be paid, however, as a lump sum and not as an annuity, and which was to be estimated by the increase in the letting value due to the improvement.[3] In the following

[1] Annual Register, 1868, p. 44.

[2] See Maguire, in the debate on the Address, Ann. Reg. 1866, p. 17.

[3] Ann. Reg. 1866, p. 43. For the bill, see Parliamentary Papers, 1866, vol. v, Tenure and Improvement of Land (Ireland).

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year, Lord Naas, on behalf of the Derby cabinet, introduced a proposition seeking to stimulate tenants' interest by providing for advances of money by the government for specified kinds of improvement. Certain of the works named were made independent of the landlord's consent, on the ground that they could not possibly damage the owner's interest.[1]

But these government measures, like a number of private members' bills, were all overwhelmed in the confusion of ministerial changes due to the questions of Parliamentary reform and Irish church disestablishment. The efforts to revamp and make useful the old principles lost their interest before the manifest purpose of Mr. Gladstone, in his now well-defined rôle of advanced Liberal and friend of Ireland, to undertake a solution of the land question on lines that should give at least as much play to tenants' interests as to landlords' rights.

On the 15th of February the bill was introduced which after long discussion became the Landlord and Tenant (Ireland) Act of 1870.[2] With this piece of legislation the new era in the land question was definitely opened. Mr. Gladstone announced that the demands for justice to the tenants were by this law to be fully satisfied, and the vexatious matter was to be finally settled. Nothing could be more perfectly characteristic of the usual relation between the government's acts and Irish demands than the fact that the present bill bore a close resemblance to that framed by the Tenant League in 1852.[3] In other words, the government had reached the point where Irish agitation had been eighteen years before. It was going to take eleven years to reach the point where the Irish leaders now stood. British concession had got as far as the Ulster tenant right;[4] Irish demand was far away at "the three F's."[5]

For our purpose it may be well to consider first the solution

[1] Levelling of old fences, the making of new fences and roads and the erection of buildings. Ann. Reg. 1867, p. 141 *et seq.*

[2] 33 and 34 Vict. c. 46.

[3] Chichester Fortescue, Hansard, 3d series, vol. cxcix, p. 1433. For the bill of 1852, introduced by Sergeant Shee, see Bills Public, 1852–53, vol. vii.

[4] Hansard, vol. cxcix, p. 1443.

[5] Free sale, Fixed tenure, Fair rents.

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given to the question of compensation for improvements — the leading question of the preceding period. Here the act was entirely adequate. With a number of equitable qualifications, the incumbent of any tenancy less than a leasehold for thirty-one years was given a claim, at the termination of his tenancy, for compensation for improvements made by himself or his predecessors in title.[1] For holdings of not more than fifty pounds annual value, any contract depriving the tenant of this claim was made void, and in general the presumption of the law was declared to be that all improvements were the work of the tenant.[2] The determination of the amount due, with all considerations of limitations and set-off, was left to the courts.

In these provisions the whole case of the Irish tenant on the subject of improvements was gained. The ancient sensitiveness for the rights of property, which had so elaborately safeguarded the landlord's interest in the management of each holding, had lost its influence. Especial emphasis had been given to the tenants' grievances by a realization of the effect of the Incumbered Estates Act. In sales under this law the improvements on the land, by whomsoever effected, had constituted an element in enhancing the price, and consequently had been made by the purchaser the basis for increased rent. The tenant, in short, had seen his improvements confiscated and sold before his face, and had then been called upon for higher rent to pay for them.[3] Facts of this sort gave great support to the claim of protection for investments of tenant's capital, and in the movement in this direction all the old obstacles set up by the landlords were swept away. The provisions of the act were made to apply to past[4] as well as to future improvements, and this clause, which had once seemed rank communism, excited almost no controversy whatever.

[1] Sec. 4.

[2] Sec. 5. This was known as "the O'Connell clause," having been devised by the great agitator. Chichester Fortescue, Hansard, vol. cxcix, p. 1445. On the insistence of the Lords, a section was inserted permitting a landlord to file with the court a schedule of improvements made by himself, and thus to counteract the presumption otherwise binding. See sec. 6.

[3] *Cf.* Gladstone, Hansard, vol. cxcix, p. 344.

[4] Provided they had been made within twenty years.

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But if compensation for improvements was conceded with little objection, it was mainly because the conservative elements found themselves hard beset by the other propositions of the bill. Now for the first time a government took up for action that "want of tenure" which from the days of the Devon Commission had been a recognized source of trouble in Ireland.[1] The popular leaders in Ireland had, by this time, gone beyond the Ulster tenant right, and were demanding for occupiers fixed tenure at fair rents, to be valued by government officials.[2] Mr. Gladstone definitely rejected *perpetuity* of tenure — declared himself unwilling to make landlords mere rent-chargers on their own estates.[3] But *security* of tenure he deemed a prime desideratum, and he shaped his course toward that end by all the side paths that seemed to lead in that general direction. He took up the Ulster tenant right, which the Devon Commission had found too radical and the Irish leaders too moderate for successful use. He encouraged long leases. He adopted the idea of compensation for arbitrary eviction. He incorporated in his bill, but with much skepticism as to results,[4] Mr. Bright's favorite scheme of governmental aid to the establishment of a peasant proprietary. The so-called "Bright Clauses" will be considered further on. Here it is important only to notice the parts of the bill dealing with tenant right and compensation for disturbance.

The general plan of the act for making tenure more secure was as follows: (1) For Ulster, the tenant-right custom was declared to be legal, and was made enforceable by the courts in case of any holding where it was proved to exist; (2) outside of Ulster any usage essentially like the Ulster custom was in like manner declared to be legally enforceable; (3) any tenant of a holding not falling under either of the former provisions, who should be "disturbed in his holding by the act of the landlord," was declared entitled to compensation for the loss sustained in quitting his holding — the amount to be determined by the court subject to the limitations of a scale embodied in

[1] See *supra*, p. 59.
[2] See Hansard, vol. cxcix, p. 1748 *et seq.*
[3] *Ibid.* p. 351.
[4] *Ibid.* p. 361.

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the act. The common element in these three clauses was that in case of arbitrary eviction the ejected tenant was assured of a sum of money which bore no necessary relation to any investment he had made in improvements on his holding.[1] Under the Ulster custom it was indeed understood that the sum paid included compensation for improvements.[2] But instances were not unknown in which the payment exceeded not only the value of improvements, but the value of the fee simple of the holding.[3] Under the compensation for disturbance clause, there was a deliberate exclusion of any consideration of improvements, which were treated in another section. While the tenant thus, at the determination of his tenancy, was legally entitled to a cash payment, the landlord, under the same circumstances, was subjected to a legal mulct. In the compensation for disturbance this pecuniary burden was direct and immediate. In case of the Ulster right the loss was indirect and more or less remote, manifesting itself through the inevitable influence of the custom on rent; for the payment came from the incoming tenant, and diminished by so much his rent-paying ability.

In dealing with the Ulster custom as it did the government very cleverly avoided the baldest attack on the landlords' property rights. The demand of the Irish agitators had been that the custom should be made the law for all Ireland; in other words, that by direct enactment a part of the landlord's interest in every holding in the land should be transferred to the tenant. But the act was limited to those estates in which this transfer had already been effected by custom; and to give legal sanction to such a custom was relatively an unimportant matter. It was easily conceded that the usage could not be abolished where it

[1] A distinction to be noted is that a voluntary relinquishment of the holding brought compensation only under the special customs, and not by the general law. Whether security against eviction while the rent was paid was an incident of the Ulster custom, had been a much disputed point. The practical solution had been that when a landlord wished to resume a holding, he bought up the tenant right.

[2] The Solicitor-General for Ireland, Hansard, vol. cc, p. 1022.

[3] On a farm rented at £25 the tenant right sold for £800; on another renting at £7 10s. the tenant right brought £160. Hansard, vol. cc, pp. 785, 786. Twenty years' purchase of the rent would often cover the fee simple.

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existed. But by many it was regarded as a serious evil. Tenant right was in fact a most vague and indefinite concept[1] and varied so much from estate to estate in all its incidents that no attempt was made to define it in the law. But besides this vagueness there was a large body of belief among those who had watched its workings that the custom was from the economic standpoint inherently vicious, and during the discussion a number of amendments were offered looking to its extinction.[2] The main charge was that the outlay for the tenant right absorbed so much of the tenant's capital as to render proper cultivation of the farm impossible.[3] There were some landlords who had expended large sums in buying up the tenant rights on their estates, believing the extinction of the right worth the outlay.[4] In justice to these a clause was inserted providing that when the landlord had bought up the tenant right of a holding, the custom should no longer be deemed to exist there.

Compensation for disturbance, also, in the first draft of the bill was so arranged as to disguise the creation of a tenant proprietary interest in the holding. No distinct provision was presented touching payment for improvements. The compensation which the tenant could claim at eviction might thus be regarded as the equivalent of his outlay on the holding, and the stickler for the just rights of property had nothing harder to swallow than the presumption — rather violent, perhaps, from the landlord's point of view — that every occupier whom the owner of an estate wished to get rid of had an actual pecuniary interest in unexhausted improvements. But this refuge for the sensitive was destroyed by the government's amendment, introduced in committee,[5] creating a special section to deal with improvements and leaving the compensation for disturbance

[1] See Dr. Ball, in Hansard, vol. cxcix, p. 1454 *et seq.*

[2] *Cf.* Hansard, vol. cc, p. 743; vol. ccii, pp. 649 *et seq.*

[3] The right was thus described by the president of the Royal Agricultural Society: "An ingenious device which takes from the landlord without giving to the tenant; and while ostensibly conferring a benefit on the cultivator of the land, really robs him of his capital so long as he has any land to cultivate." *Cf.* Hansard, vol. cc, p. 755.

[4] Lord Dufferin was one of these. He always ranked as a "good landlord." *Cf.* Hansard, vol. cxcix, p. 1506.

[5] Hansard, vol. cc, p. 1078.

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with no possible justification save the damage due to cessation of the tenancy. The mere exercise by the landlord of his legal right to resume possession of his property subjected him to a legal claim by the former tenant for a sum varying from seven to one year's rent, according as the annual ratable value of the holding varied from £10 and under to £100 and over. And this too, even in case the resumption of the holding was at the expiration of a lease, provided the term had been less than thirty-one years. It was difficult not to see in these provisions the recognition of a right in the tenant to continued occupation, and a corresponding diminution of the landlord's interest. But the government did not yet by any means defend their proposition on the ground of a direct proprietary interest of the tenant. The chancellor of the exchequer explained that since improvements were definite matters of fact, while "disturbance" was indefinite, a separation of the two items, with a maximum limit to compensation for the latter, was necessary to protect the landlord from excessive mulcting.[1] Mr. Gladstone, still clinging to the "improvement" idea, explained that the distinct compensation for disturbance was designed to cover works on small holdings, such as cabins, fences, *etc.*, which meant labor and expense to the poor tenant, but which could never be proved in court to be improvements from the landlord's point of view.[2] And the inclusion of leaseholds in the provision was merely to prevent evasion of its requirements; for what landlord would subject himself to the claim for compensation if a two-years' lease would enable him to escape it?[3]

But if the act of 1870 abandoned the protection of the landlords' absolute property rights, it gave by no means a perfect protection to the newly created tenant interest. It discouraged eviction, but it did not make it impossible. The government steadfastly refused to consider any proposition looking to interference with the landlord's right to demand what rent he pleased; and non-payment of rent debarred the tenant from

[1] Mr. Lowe, Hansard, vol. cc, p. 1194.
[2] Hansard, vol. cc, pp. 1444 *et seq.*
[3] *Ibid.* pp. 1533 *et seq.*

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claiming compensation at eviction.[1] Under the Ulster custom it was open to the landlord to extinguish the tenant right by forcing the rent up to such a point that no one could afford to bid for the occupancy. The tenant on such an estate, however, was given by the act the option of claiming under the general compensation clause. But here there was nothing whatever to prevent the raising of rent to such a point as to make non-payment a certainty, and hence to secure to the landlord the absolute control over the holding. In a country where competition for land was less fierce than in Ireland, the bill would have promised much for security of tenure. But for that country the prospect was not reassuring; and it was pointed out that the arrangement by which the rate of compensation was largest for the smallest holdings would inevitably create a tendency toward consolidation of farms[2] — that most fatal of facts for the peace of Ireland.

In the overwhelming importance of the compensation idea in this act of 1870, little attention was attracted to the minor features of the scheme. We may notice, however, that the earlier propositions for effecting improvements in the general situation of Ireland were still in the minds of the framers. The efficacy of long leases is still recognized in the provisions exempting leaseholds of thirty-one years and over from the compensation clauses of the act; and the evils due to limited ownership are assailed in the section (28) extending the power of limited owners to grant leases. Excessive subdivision of farms finds discouragement in the denial of compensation to tenants who subdivide or who let holdings in conacre. And finally, the question of the condition of the agricultural laborers, after giving rise to lively controversy, resulted in permission to the landlord to take into his own hands, without incurring a claim for compensation, sufficient land for the construction of decent cottages for the laborers necessary to the work on his estate.

[1] In case of existing tenancies the court was authorized by section 9 to consider a claim for compensation in case of ejectment for non-payment of rent, when the rent was under £15 per annum and the court believed it to be exorbitant. For the special reasons for this judicial valuation of rents, see Hansard, vol. cci, p. 400 *et seq.*, esp. Gladstone, p. 404.

[2] *Cf.* Montgomery, *op. cit.*, p. 147.

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Such in general outline was Mr. Gladstone's first great land act. That it effected an enormous revolution in the relations of landowners and their tenants, was obvious. That the new relations would insure tranquillity to Ireland, was not so clear. The landlord class fretted under the restrictions imposed upon their property rights after a decade of the most complete freedom. The "good landlords," who were universally admitted to be a great majority of the class in Ireland, were insensibly led to substitute a more strictly legal system for the old patriarchal régime on their estates, and the "bad landlords" found evasion of the law a matter of no great difficulty. The tenants, on the other hand, keenly appreciated at first the credit which their claim to compensation gave them, but soon realized that their tenure was little more secure than before. The farm from which the occupier could assure himself of some sort of a living might be taken from him, and a sum of money, with the proper use of which he was wholly unfamiliar, given to him instead. Moreover, rents tended steadily to rise; for the risk of a claim for compensation could not be carried by the landlord gratuitously.

It was through the Home Rule Association, organized in Dublin while the land bill was before Parliament, that the dissatisfaction with Mr. Gladstone's Irish measures found formal expression. But while the landlord interest was largely concerned in the formation of the Home Rule party, the policy of the party, under the leadership of Mr. Butt, soon took the direction of more radical concessions to the tenants. The "three F's" became the burden of the Home Rulers' demand, and many bills in this sense were brought up in Parliament[1] between 1870 and 1880, but no government gave them support. It was not till the rise of Mr. Parnell to prominence and leadership, and the thorough democratization of the Home Rule party, that the government was forced to acknowledge that the Irish land settlement could not be left as final.

WM. A. DUNNING.

[1] Mr. Butt's bill in 1876 provided for perpetuity of tenure, with a periodical revision of rents on the basis of agricultural prices. Parliamentary Papers, 1876, vol. iii.

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THE COUNCIL OF APPOINTMENT IN NEW YORK.

THE history of the council of appointment in New York is of great importance to the student of American politics, because the power of this body was so employed as to exercise a marked influence on the political morality of not only the state but of the whole country. It was in New York that political offices first came to be regarded as spoils belonging to the dominant party; but when this doctrine had obtained nearly axiomatic force in American politics, few people remembered that it was first recognized in New York or that the New York system was carried into national politics only after the council of appointment had been swept away by the indignation which its corrupting influence had aroused.

The method in which the council was organized as well as the spirit in which its powers were employed are intelligible only as a result of the struggles between the people of New York and the royal governors. The contests of the provincial period turned largely upon the question of the appointing power. Since the royal officials were to be paid from the proceeds of the provincial taxes, the taxpayers claimed for their representatives the right to see that their money was not misappropriated. The New York assembly accordingly strove to gain the right of nominating all those officials whom the province had to support except the royal governor. In this struggle party feeling was strongly developed; and in the time of Governor Clinton the faction which opposed the governor and which was led by De Lancey began to use the patronage of the province for its own ends. In doing this, the De Lancey party simply followed the practice then in vogue in England. The only difference was that in England the patronage was at the disposal of the King's government, while in New York it was controlled by the assembly and its officers. It is very likely

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that the recollections of this contest for the appointing power were fresh in the minds of the convention of 1777, which instituted the council of appointment; and that it was because of these recollections that the convention was unwilling to trust either the governor or the senate or the assembly with the sole appointing power. It is of interest, therefore, to trace the history of the appointing power through the provincial period.

I. *The Appointing Power in the Province of New York.*

The province of New York was not an English settlement, but a conquered dependency of the British crown. The King ruled over New York not as a proprietary or charter lord, but as a sovereign prince. He delegated the government of the province to a governor, whose authority was limited only by the royal commission and instructions. But political circumstances and the character of the people made it impossible to maintain the absolute power of the crown. After the Dutch had been finally dispossessed and the Duke of York had received the province from the King, a representative assembly was granted to the freeholders. After a few years the proprietary government lapsed and the assembly, after having granted James a revenue for life, was dissolved. New York became a royal province, but did not receive a charter. The inhabitants, however, steadfastly demanded rights of self-government, and when James II lost his throne these demands were granted.

As proprietor of the province, the Duke of York had conferred the entire appointing power upon his lieutenant; and during his reign as King this power was exercised by the governor and his council. The members of the council were proposed by the governor and appointed by the crown; but in case the number of councillors fell below a quorum, the governor had power to appoint. The governor also exercised the right of taxing the colony for the benefit of his government. The power of the crown over the officials and over the purses of the subjects was equally complete; and we shall see that the people came to regard appointment and taxation as correlative

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functions of government, and aimed at the control of both. They desired to secure the appointing power, and as a first step, they demanded the right of voting and apportioning the taxes and supplies.

After the English revolution of 1688 the people (or at least the freeholders) of the province obtained a representative assembly; and from this time New York's politics may be said to date. The appointing power was left with the governor, who was responsible only to the crown. But the granting of the taxes from which the salaries and other governmental expenses were to be paid was in the power of the assembly; and this body, well aware of its power, constantly refused to grant supplies till its grievances were redressed. The governors, treated with more or less indifference by the home authorities, had to contend with the hostility of the French and the never-ending alarms aroused by the Indian confederations. At first the assembly asserted only that it had the sole right to grant taxes, and that the other organs of the colonial government had no right to amend supply or tax bills. The colonial necessities forced the governor's assent to this claim. But this was only the beginning. In 1705 the demand was made that extraordinary grants of money should be administered by a treasurer appointed by and responsible to the assembly alone. This concession the governor refused to make, and for a year the government was left without supplies. In 1706, however, Queen Anne conceded the point in dispute, *viz.* that all extraordinary supplies were to be granted to the treasurer of the assembly. This seemed to imply that henceforth the assembly could also determine what supplies were to be regarded as extraordinary; but on this point there arose a more obstinate conflict. Taking advantage of Governor Hunter's difficulties, the assembly, between the years 1710 and 1714, granted all taxes as extraordinary and tried to limit their duration to one year. This made the governor and the other officials dependent upon the pleasure of the assembly for their salaries. In 1714, accordingly, the crown resolved to pay the governor's salary. This rendered Governor Hunter personally

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independent of the assembly; he secured appropriations for longer periods, and it is likely that he would have re-established the power of the crown over the purse, had not the accession of a new dynasty and the disorders of 1715 prevented a resolute assertion of the royal claims.

The appointing power, already undermined by the recognition of the assembly's treasurer, was the next point of attack. The governor insisted, indeed, that no warrant was valid without his signature, even if it were drawn on this treasurer; but the assembly not only maintained its claim to grant supplies on its warrants, but practically brought under its control all officials necessary to the collection and management of the revenue. This was accomplished, even where appropriations had been made for a number of years in advance, by giving the poorly paid government officials extra allowances, the name of the official being inserted in the grant attached to the office. From this point the assembly soon advanced to granting the entire salary of any officers whose names were inserted in the appropriation bills. By the year 1729 the assembly had all but usurped the power of appointing the officials, and had so weakened the responsibility of the governor that it was accused of trying to assert the political independence of the colony. But the English government neglected the remonstrances of its governors and thus strengthened the position of the representative body.

Of course the governors used every means of resistance against the encroachments upon their power. In 1715, for example, Governor Hunter, with the aid of Lewis Morris, made a bargain with the assembly by which the governor secured appropriations for five years. In return Hunter appointed Morris to the chief-justiceship. After this, however, Morris placed his services at the disposal of the party in power in the assembly, who doubled his salary. In 1733 Morris quarrelled with Governor Cosby over the equity jurisdiction which the governor claimed under his commission; and, as Morris's tenure was during pleasure, the governor removed him and appointed De Lancey chief justice, also during pleasure. When Morris

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sought an election to the assembly, the governor's influence was sufficient to defeat him. The sheriffs also held during the governor's pleasure, and the sheriff of Westchester refused to allow thirty-eight Quakers to vote for Morris, because they declined to be sworn.

Governor Clarke's long administration accustomed the people to the sight of an aggressive assembly that guarded the rights and interests of its constituents; while the indifference of the crown to the loss of its prerogatives did much to damp any enthusiasm for the party of the governor among those eligible to the council or the assembly. When Admiral Clinton became governor (1743), he found the latter body in control of the patronage of New York and the officers as independent of the governor who commissioned them, as they were dependent on the assembly which salaried them. Annual supplies only were granted; and as all salaries were voted to the officials by name, the power of appointment and removal, as far as the enjoyment or loss of the salary was concerned, was in the hands of the assembly. Governor Clinton's administration left this body even more powerful. At the outset he was hampered by the existence of war between England and France. He had constantly to appeal to the assembly for supplies and taxes; and accordingly onerous conditions were imposed upon every grant. The majority was controlled by Chief Justice De Lancey, one of the ablest men in the colony. Clinton had unwisely reappointed him during good behavior, instead of during pleasure, and had thus made him independent. Under his leadership the assembly put itself in control of the public works and of the Indian department, and finally struck out from its supply bills the names of officers appointed by Clinton, substituting others and forcing the governor to make out commissions to its nominees. Of course the officials came to consider themselves as officers rather of the assembly than of the crown, and the governor could do nothing to remedy this state of things. But before he abandoned the struggle Governor Clinton made a serious effort to re-establish the influence of his office. He refused to sign any annual appropriation or tax bills, and de-

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manded a grant of supplies for a long term of years. Both parties understood that the appropriation for a term of years would restore the appointing power and its patronage to the governor. As the assembly had fully ascertained not only how much power but also how much money there was in office-mongering, it refused the governor's demands. As a consequence the salaries of the governor and his nominees were left unpaid; no provision was made for the subsidies to the Indians; the Indian department under Colonel Johnson was at its wit's end, the fortifications were crumbling to pieces, the current bills for supplies were not met — in fact, the government in New York was dissolved through this conflict over the appointing power. Clinton's reiterated reports regarding the helplessness of the governor and the hostility of the De Lancey faction finally forced the home authorities to investigate the matter. But they took up so much time in reaching a decision that Clinton resigned, having first given De Lancey the commission of lieutenant-governor. In the absence of any governor, De Lancey assumed all his functions except that of chancellor. But the contest over the appointing power continued; for De Lancey as governor took very much the same position as Clinton, and Clinton had the satisfaction of seeing him exposed to the same discomforts. De Lancey resisted the annual bills and the usurpation by the assembly of nominations to the offices, both civil and military; but with no better success than his predecessors. In the end, the English crown acknowledged itself beaten by the New York assembly and conceded to the latter the right to make annual appropriations by name and office. In September, 1754, the governor was authorized to assent to annual appropriation bills, and after Governor De Lancey's death, in 1760, the governors were forbidden to receive salaries from the assembly.

The long struggle between the executive and the legislature over the appointing power in the province of New York was accordingly settled, in its main lines at least, when George III ascended the throne. The reports of the governors were no longer filled with complaints about the usurpations of the

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assembly, because the governor had henceforth little interest in its action. He was independent as regarded his salary, and the details of government were mainly left to the legislature. There was a tendency to make the speaker of the assembly the executive officer in controlling the expenditures and the appointments to office. At the close of the colonial period, the representative body shifted its attention to controlling the tenure of the judges. The precedent of Clinton's appointment of De Lancey during good behavior was eagerly seized by the assembly; it insisted on the duty of the governor to appoint all the justices during good behavior, while it refused to make any provision for their salaries beyond the annual supply. As Lieutenant-Governor Colden did not dare sanction the wishes of the assembly, another contest broke out. The puisne judges tried to force Colden's hand by their refusal to act unless their commissions were changed to run during good behavior. The English government sent over a mandamus, and Colden made Pratt, the English nominee, chief justice during pleasure; but after a few years Pratt withdrew, the assembly having refused to make any appropriation for his salary.

The years of the Stamp Act agitation followed, and soon the Revolution began with the conflict of Golden Hill, followed by the affair of Lexington. The English governors were still in New York City when the province declared itself a state. During the war two governments existed: one in New York City for the English province; another wandering about under the title of the Convention of the People of the State of New York. In 1777 this convention reported a constitution which became the basis of the new order of things. Before passing, however, to the appointing power under the new state constitution, it is important to realize fully these facts in the provincial history, namely: that a conflict of nearly a century had wrested the power of appointment from the executive and had given it to the assembly; that in this conflict party passion had been strongly awakened; and that intimidation and even bribery were arms which had been employed, and employed successfully, by the partisans on either side.

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II. *The Appointing Power from* 1775 *to* 1801.

In 1775 the assembly, which had not been renewed for a very long time, had lost touch with the people; and thus it came about that the people of the colony, in order to express their disapproval of the home-government's policy, elected a new and different body, the provincial Congress, afterwards known as the convention. This body was the *de facto* state of New York, in opposition to the legal government of the crown. It nominated, authorized, constituted and appointed all officers necessary to carry out the wishes of the people of the colony. During the first year, 1775–76, its minutes show that the organization of the army and military appointments chiefly occupied its time. But in July, 1776, after some discussion, it was recognized that this was not state but Continental business. On the 16th of July the convention requested General Washington not only to appoint officers to command the state troops, but also to appoint the officers of the commissariat. The convention then found time to undertake the formation of a government. This it began by extending its sanction to all existing authorities, resolving that all persons in office should remain at their posts so long as they were well disposed, and that all processes and commissions should run in the name of the people of the state of New York. In the following weeks the convention appointed surgeons and instituted a court of admiralty. Meanwhile experience had shown that efficient government required the exercise of certain powers by committees instead of by the convention as a whole. Of all these, the central committee, or council of safety, was the most important. It exercised a collegiate dictatorship over the state when the convention was not in session, and at such times it also exercised the appointing power. It probably did very much to perpetuate the English tradition of the desirability of a second chamber.

A plan of government was brought before the convention during the winter of 1777 and eagerly debated in committee of the whole. The minutes are far from full; yet the amount

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of space devoted to the discussion of paragraph 22 of the plan shows how much interest the organization of the appointing power attracted, and how important this power was felt to be. The subject was brought up on April 10th by Mr. Morris's motion "that all civil officers not eligible by the people be appointed by the governor and the judges of the supreme court." He afterwards withdrew this motion, and submitted to the convention the preliminary question: "Whether it would be wise to authorize or permit that the people have a voice in the nomination or appointing of any of the officers?" The plan indicated was not in accord with the feeling of the time. In spite of the fact that the people consisted of freeholders only, the proposition was regarded as too democratic. At a time, moreover, when the disaffected were so numerous that the revolution had much the character of a civil war, the proposal seemed especially hazardous. On the same day Jay, seconded by Morris, brought in his plan for the council of appointment in the following words:

> That all civil officers other than those who by this constitution are directed to be appointed otherwise, shall be appointed in the manner following, to wit: The general assembly shall once in every year openly nominate and appoint one of the senators from each great district, which senators [together with the speaker of the assembly for the time being] shall form a council for the appointment of the said officers, and of which the governor for the time being, or the lieutenant governor or the president of the senate when they shall respectively administer the government, shall be president and have a casting vote but no other vote, and with the advice and consent of the said council shall appoint all the said officers; and that a majority of the said council [with the governor] be a quorum, and further that the same senators shall not be eligible to the said council for two years successively.

The bracketed phrases were not contained in the original motion, but were added by Jay and Morris subsequently. Jay's plan in the main withstood all attacks, either in the committee or in convention. But in the first instance nearly every member of influence had a plan of his own for preventing any

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abuse of the appointing power and avoiding a repetition of the contests which had been so frequent in colonial times. That those contests were fresh in the minds of the convention and that they had created a strong prejudice against any one-man power, is evidenced by the decision which was reached as regards the treasurer. It was determined that this officer should be elected by the assembly and senate independently of the governor. The same distrust of the governor underlies all the plans proposed for the bestowal of the state patronage. There was a general inclination to vest the appointing power in the legislature. One plan proposed that the two houses should appoint in each case by a special bill. But this was felt to deprive the governor of all influence and responsibility, and the convention was not prepared to go so far. Another plan gave the legislature the right to nominate two candidates for each office, and restricted the governor's power of appointment to a choice between these nominees. Even this plan did not please the convention, because it left with the governor the power of removing, and this was considered too great a power to be left entirely with one man. Finally the convention returned to the plan of a council. As proposed by Jay, the council of appointment was to be composed of *ex-officio* and elected members. The four senators were to be elected by the assembly once a year, and in such a manner that each of the great sections would be sure of representation. The governor was to be president of the council *ex officio*. To this scheme an amendment was proposed by Captain Platt, vesting the appointing power in five senators and the justices of the supreme court (then three in number), under the presidency of the governor. This plan pleased Jay, but failed to obtain a majority. Jay and Morris then amended their own plan by adding to the council, as a counterpoise against the dreaded power of the governor, the speaker of the assembly, who had exercised great influence during the period immediately preceding the Revolution. In this amended form the plan was reported from the committee and adopted by the convention. On April 19, however, the convention reconsidered its action, and on the motion of

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R. R. Livingston removed the speaker from the council. A motion to have a fifth senator of the council appointed by the senate was rejected. The council of appointment thus finally assumed about the form originally suggested by Jay. Together with the power of appointment the council was vested with the right to dismiss from service any officer whose tenure was not fixed by the constitution.

In its provisions regarding the tenure of various officials, the convention showed again the influence of colonial experiences. On all those points which had agitated the colony and which had been subjects of complaint against the English government, the convention meant to bind the hands of both the governor and the legislature. The question of the annual appointment of sheriffs and coroners had been debated for eighty years. These administrative and fiscal officers exercised a considerable power in their counties, and therefore the people had desired to have them in office as short a time as possible. The convention provided for the annual appointment of these officers, with a prohibition against reappointment for more than four consecutive terms. Even in the counties the one-man power was to be guarded against. In the colonial period, again, the judicial tenure had been a very vexed question. The new state constitution made the judges of the state courts and the presiding judge of each county court of common pleas independent of legislature and governor and irremovable except for cause. For all inferior courts it was required that the commissions should be renewed at least once every three years.

In judging Jay's council of appointment from a modern point of view, the error contained in the plan is evident enough. We have ceased to fear the one-man power where the responsibility is commensurate with the power; and we prefer to entrust discretionary duties to individuals rather than to boards, because in the latter responsibility is so divided that in the end it entirely disappears. But it must be remembered that Jay had no idea that the senatorial members of the council would usurp the governor's right of nomination. The council was not designed to destroy the power of the governor, but to prevent

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the misuse of his power. And it must always be remembered that the experiences of the colonial period had convinced every one that such checks upon the executive were absolutely essential to liberty and to good government.

Before the new government could be set working, it must be organized; and this was done as rapidly as possible. On April 20, 1777, the convention ordered the publication of the constitution at Kingston Court House. In the early days of May it appointed a long list of officers, both state and local, adopting in respect to the latter the suggestions of those of its members who were at the same time chairmen of the various local committees of safety. On the 13th of May, after having conferred the appointing power with the other prerogatives of a temporary government upon its committee of safety, the convention was dissolved. Between the 21st and the 28th of May this committee nominated officers for many regiments. On the 22d and 23d of May, Jay and Livingston took oaths as chief justice and chancellor and Egbert Benson as attorney and solicitor general before the president of the committee. Towards the end of June Yates and Hobart qualified before the committee as puisne judges of the supreme court. In June the sheriffs were ordered to hold elections for governor, lieutenant-governor, senators and assemblymen from the great districts. On July 9 the committee declared that the freeholders had elected George Clinton to be both governor and lieutenant-governor, and that he must resign one of the two offices. Clinton chose the governorship, and on the 30th of July took oath before the president of the committee. The new government was now in working order, but the committee of safety did not disband until January 14, 1778. It worked side by side with the regular government for nearly six months, and made appointments as late as January 3, 1778, although the council of appointment had already begun its labors. Among the last appointees of the committee were two clerks for the council of appointment.

The first council of appointment met at Kingston, on the 20th of September, 1777, and was composed of Governor George

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Clinton and Senators J. M. Scott, A. Yates, J. Woodhull and A. Webster. On the 22d it began to make history by creating Richard Hatfield county clerk of Westchester. Two days later it voted to give to the county clerks the offices of clerks of the inferior courts of common pleas, clerks of the peace and clerks of the sessions of the peace, thus putting them on nearly all county commissions, except that of oyer and terminer. On the 17th of October it appointed Livingston and Jay, Yates and Hobart to the judicial positions to which the committee of safety had already appointed them; to the end, obviously, that their constitutional tenure might not be called into question because of their appointment by an extra-constitutional body.

The real work of the council began in 1778. At first, its powers were exercised in a very conservative spirit. During the continuance of the struggle with England it was of course necessary to restrict the offices to the friends of independence; but it was not customary to employ the patronage of the state to strengthen any particular group of patriots or to increase the political following of any particular leader. The proscription of all opponents was not yet the rule; nor was it yet perceived that the principle of rotation in office might be so applied as greatly to increase the number of rewards available for friends.

The germ of the rotation principle was indeed contained in the constitutional provision which prohibited the council from reappointing the same person sheriff or coroner for more than four consecutive years. The intention, of course, was to prevent county offices from becoming life-estates and the county officers from becoming too powerful. But the actual effect of the rule, as applied by the council, was to rotate a few persons through a series of offices. We find that efficient officers were kept constantly in the public service, now as sheriffs, now as coroners and again as surrogates. The local sentiment seems to have favored this system; and the council, in making local appointments, seems to have been influenced mainly by the wishes of the localities. In fact the offices to be bestowed throughout the state were so numerous that the council could

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not possibly investigate the qualifications of each appointee, but was forced to depend largely upon local suggestions.

In some counties this system resulted in the construction of family "machines." We find brothers succeeding brothers and sons following fathers in the same local office, or simply redistributing the offices among themselves from term to term. In other counties certain great families, through direct influence with the council of appointment put their *protégés* into such offices as they desire and keep them there as long as suits the family interest. This development of family influence was not due to the organization of the council, although the dispensation of patronage by so small a body undoubtedly aided its growth and facilitated its exercise. It was really a result of the limitation of the franchise. With a limited electorate the political machinery is regularly controlled by a few leading families. Under such a system the politicians do not expect to live from politics. It is because they have already the means of existence that they are able to devote themselves to politics. What they desire is honor and power. With a widened suffrage a more elaborate and costly machinery is required; it becomes necessary to have solid rewards for services rendered; political management becomes a means of livelihood, and patronage plays a different rôle.

In the absence of any constitutional guarantee of tenure (such as the higher judges enjoyed), the council had the power of removal from office. At the outset there were few removals without cause. But in filling the peace commissions for the counties, the council fixed the time for which their powers should run. In many cases the term was no longer than three months, and the commissions had from twenty-five to fifty-five members, whose continuance depended on the pleasure of the council, or in reality, on that of the senator representing their grand district. Among the more important commissions were those of *dedimus potestatem* and oyer and terminer with gaol delivery. By the *dedimus potestatem*, the people of the state gave specified persons the right to administer oaths within the county, while certain prominent citizens and officials were

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named in a like commission for the entire state. The commission of oyer and terminer always included the chief justice and puisne justices of the supreme court in every county, and one of them always was to hold court. The county members on this commission seem to include the most prominent former office-holders, although new names often appear.

As long as the war lasted, the appointment of military officers constituted an important part of the work of the council. The multitude of corrections in names, rankings and dates which the records disclose show how hurriedly the council had to act and how little direct examination each case could have received. Even after the war, the unsettled state of the country did much to keep the council busy in filling the places of officers who had removed from their militia districts or who had resigned or received higher rank. After the federal constitution went into effect, the council of course had only militia appointments to make. The higher positions were commonly conferred upon county magnates, friends of the ruling families, *etc.* The commissioned officers of the lower grades seem to have owed their appointment to the choice of their soldiers.

The work of the council was done very quietly during the first ten years. It was practically undisturbed by party strife, because no clearly marked party lines had yet been drawn. There was rivalry between the great families, particularly between the Clintons on the one side and the Livingstons and Schuylers on the other; but there were as yet no true parties. But when the question of the adoption of the Philadelphia constitution came up, these rivals took opposite sides and the formation of parties began. Clinton was opposed to the new constitution on many grounds, not the least decisive of which, perhaps, were personal. Under the new Union the state would lose much of its independence, and therefore his importance as first man in the state would be diminished. The Livingstons and the Schuylers, on the other hand, with whom Alexander Hamilton had connected himself, not only favored the new constitution on public grounds but saw in the issue thus raised an opportunity of driving Governor Clinton from

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power. The more wide-spreading results of the ensuing conflict do not here concern us, and they are too well known to require recapitulation. Important, however, for the purpose of the present study is Hamilton's attack upon the council of appointment as a whole, and upon the governor's position in the council.

In his discussion of the appointing power in the *Federalist*, Hamilton maintained that the plan contained in the Philadelphia constitution was better adapted to secure good appointments than the plan followed in New York. In criticising the latter system, Hamilton dwelt upon the secrecy with which the council acted, and the impossibility of penetrating its motives. He insinuated that corrupt considerations might easily influence the actions of such a body; the more easily because the responsibility was divided. The responsibility for nominations even did not rest wholly on the governor, because, according to Hamilton, the sole right of the governor to nominate to office was not at all settled. As Hamilton construed the constitution, the senatorial members of the council possessed a concurrent right of nomination.

This was a new point. Neither Jay, the author of the council, nor Clinton, its first president, had regarded the council as anything but a check upon the governor, or attributed to it any other power than that of withholding its consent. It is of course possible that Hamilton advanced his new construction only to score a point in favor of the clearly defined power of the President of the United States; but it is certainly improbable that so shrewd a politician did not foresee the results which his suggestion might have in state politics. As a matter of fact we shall see that when the Federalists obtained control of Clinton's council, they asserted their right to nominate; and when the situation was reversed, the younger Clinton used the precedent so cleverly as to destroy the appointing power of the governor.

The first conflict between the governor and the council of appointment had taken place in 1781. The senate had expelled one of its members, who was also, by the choice of the assem-

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bly, a member of the council. The assembly proceeded to fill the resulting vacancy in the council by electing another senator. To this the governor objected, on the ground that the constitution gave the assembly the right to elect a council once only in every year. Clinton's attitude seems to have been determined simply by a desire to enforce the constitution as he understood it. It is not apparent that it was of political advantage to him to distribute the patronage with but three members instead of four. The governor's objection did not prevail; the fourth senator (Parker), against whose admission the protest was directed, remained in the council.

The next instance in which the council asserted its authority over the governor, was in the formal matter of signing the record. From September, 1777, to December, 1788, the record of the appointments was sometimes signed by the president and the council, and sometimes left unsigned. In connection with some of the earliest appointments the minutes show a blank space which never was filled up. It had never been claimed that the appointments were invalidated by this formal defect. When, however, in December, 1788, Clinton alone signed the record, his council at its meeting of January 30, 1789, proceeded to rehearse and re-enact the December appointments and signed the record in order to give validity to the appointments.

In both of these cases, we note a tendency on the part of the council — a tendency soon to be converted into a conscious effort — to become a motor in state politics rather than remain simply a restraining cog on the governor's power. The next step of course was to assert the right of each member to nominate, which would give the majority the control of the whole state patronage.

In spite of the comparatively small population of the state, the stake in play in the ensuing contest was very great. Except the state treasurer, all state officers in the administration and in the courts were appointed by the council. The same body filled the county commissions for the peace, oyer and terminer, and *dedimus potestatem*. In the three cities of Albany, New

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York and Hudson, it appointed the mayor, clerk, recorder and city marshals, besides cullers of staves and heading, packers of beef, inspectors of pearl ashes and potashes and inspectors of flour. In the ports of New York and Sag Harbor the state had secured the right of appointing the customs officers. In 1781 this right had been surrendered to the United States, but in 1786 the state resumed it. Thus the council of appointment could appoint collectors of the port, land and tide waiters, gaugers, weighmasters, portmasters, portwardens, pilots, quarantine officers, weighers and sealers, measurers of beams and weights and recoverers of goods from wrecks.

It seems that these offices had thus far been bestowed in such a wise as to give satisfaction to the various classes of the people, and even to such subjects of the state as were not freeholders. The offices were not as yet used as payment of campaign service, because party strife had not yet become sufficiently envenomed. Under Governor Clinton no removals had been made for political cause. It was primarily the action of the Federalists that changed New York politics. In their attempt to strengthen the hands of the federal government, they dispensed its patronage to suit their ends. As soon as they obtained control of the New York legislature, they sought to obtain the state patronage also. To this end it was necessary to break the hold which Governor Clinton had upon the appointing machinery.

The great contest between the governor and his council began in 1794, on the question of appointing a fifth justice to the supreme court. The convention had started this court with a chief justice and two puisne justices. But in 1792 the increasing business of the court rendered the appointment of a fourth justice necessary; and by the casting vote of Clinton, Burr was appointed. After his refusal of the office, Lewis was made fourth judge. A year later a fifth judge was declared to be required, but Clinton refused to make any nomination. In 1794 the legislature (now controlled by the Federalists) forced Clinton's hand. Mr. Hoffmann, in the assembly, attacked the existing council so severely that although it had not been

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in office one year, a new council was elected on the ground of political necessity. Political necessity meant in 1794 that the Federalists proposed to control the appointing power. The existing council contained three Democratic members. The new council, elected in spite of violent opposition, contained three Federalist members. These, in obedience to the party mandates, disregarded the claim of Governor Clinton to the exclusive right of nomination, and, on a nomination made by one of themselves, appointed Egbert Benson the fifth judge. Governor Clinton did not dissolve the council, but entered a protest against its action. He maintained that the governor had the sole right to nominate, and he pointed out that the usurpation of this power by the senators destroyed his responsibility for appointments. The Federalist majority did not believe themselves wrong; nor does it appear that the people generally sympathized with the governor. The fear of a strong executive had become a tradition — almost a hereditary sentiment, and it did not abate in the public mind even after the governor was elected by the people. In fact, of course, the governor represented the people more directly than the council, chosen by the assembly from among the senators; but the council, annually chosen by an annually elected assembly, was a more perfect index of the fluctuating sentiment of the state. By contrast, the governor represented the stable element of authority.

The appointing power once in their hands, the Federalist majority in the council proceeded to utilize it. One of the first measures adopted was intended to reward their supporters without removing their opponents. In all cases in which the number of such officers as judges and justices of the peace was fixed only by custom, the council decided that the number to be appointed lay entirely in its discretion. It was thus enabled to appoint in each case a sufficient number of its political adherents to outvote the older appointees. In some commissions, which at first had about twenty members, we find later forty or fifty. It is certain that the counties concerned had not doubled in population, and there is no evidence that

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they had grown twice as lawless. When it came to the sheriffs and coroners it was easier to strengthen the Federalist cause. These officers had only an annual term; and the council had only to oppose the reappointment of Clinton's sheriffs. A stronger conviction now appears of the value of rotation in office. Officers holding for short terms were less and less frequently reappointed; and long before Burr and De Witt Clinton were accused by their enemies of having corrupted the political ethics of New York, offices had begun to be regarded as "good things" to be distributed, rather than as public functions to be discharged.

Governor Clinton of course protested against the acts of the majority and the motives which determined them. He told the council that its refusal to reappoint the officers with an annual term amounted to displacing them, and this it had no right to do. He was responsible for the conduct of the administration, and was therefore entitled to choose the subordinate agents of government. He tried to show the council that its action would discourage high-minded men from seeking office, and would further injure the public service by inducing the officials to devote more time to electioneering than to the proper discharge of their duties. All these arguments were sound, but they had little effect upon men who were acting from motives of interest and expediency. The council, however, felt it necessary to retort; and it tried to show that the governor was no better than those whom he criticised. Clinton, they declared, had appointed a military officer out of course, and had refused to reappoint an over-zealous Federalist as sheriff. When we remember that Clinton had been governor for seventeen years, these two cases of partisan use of power do not seem to constitute a grave indictment.

But if the governor was triumphant in the argument, all the substantial fruits of victory were in the hands of the senators. They had maintained their claim of a right of nomination concurrent with that of the governor, and this amounted to the power of appointment. They had changed the practice of the constitution in regard to the actual term of the annual appointees.

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Instead of simply checking the governor, the council threatened to become the irresponsible ruler of the entire administrative service. The dream of the constitution-makers that the question of the appointing power was settled was dissipated by the political aggressiveness of the legislature. There was a touch of irony in the fact that Clinton's successor, Governor Jay, the framer of the council of appointment, was forced to ask the legislature to construe the supreme law he had made at Kingston. In view of the difficulty which Clinton had had with his council, Jay's first measure was to try to have the legislature pass a declaratory law, deciding whether the council had the concurrent right of nomination, or the governor the exclusive right. As Jay was himself a Federalist, he hoped that the Federalist legislature would confront the question in a judicial spirit. But unfortunately his supporters were not willing, for the sake of affirming a mere principle, to put their party friends of Clinton's council in the wrong. A bill introduced by Morris, declaring that the governor had the exclusive right of nomination, failed to pass in the assembly. The Federalist leaders were the less willing to tie the hands of their senators, because they meant to use the state patronage to assist Hamilton in building up a machine to perpetuate the Federalist régime, and they rightly judged that Jay was too high-minded and scrupulous a man to lend himself to such a scheme.

But while the assembly was unwilling to affirm the governor's exclusive right to nominate, neither did they deny it. It was not absolutely necessary to decide the question, as long as the governor and the majority of the council belonged to the same party. Both were naturally desirous of avoiding open conflict; and although once, at least, the council overrode the governor, appointing (in 1798) a secretary of state whom he did not desire, for the most part such conflicts were avoided. Under these circumstances Jay succeeded in restraining to some extent the partisan zeal of his friends. It was his principle never to make a removal for partisan reasons; and although he did remove a Democratic sheriff in New York

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and install a Federalist in his place, in the main he adhered to his principle.

The number of offices in the control of the council received some important additions during Jay's administration. The office of state controller was created, with the power of appointment in the council. To this officer were given all the more important functions previously exercised by the state treasurer. In declaring that the state treasurer should be elected by the two houses, the constitution had placed him beyond the reach of the council. This was precisely what the politicians objected to. They had found that the appointees of the council were most amenable to party control. As they could not do away with the treasurer, nor change the method of appointing him, they resorted to the above device for superseding him. Among other new officers the assistant attorneys-general should be mentioned. As their name implies, they represented the prosecuting officer of the people. One of these assistants was to serve in each of the great districts of the state; and justice became more certain and punishment more rapid than had previously been possible.

In the year 1800 the Federalists lost their majority in the legislature. But the governor and the council of appointment were still Federalist; so that the situation was that of 1794 reversed, the Democrats standing now where the Federalists stood then. Soon after the assembly had organized, it tried to turn the existing council out of office, although the legal term of that body had not yet expired. In this the Democrats were defeated; and it was only after the Federalist senators had served their term (in January, 1801) that the Democrats elected their council. It contained three Democratic members: the turncoat Spencer, who had left the Federalist party because he had failed to secure the controllership; De Witt Clinton, nephew of ex-Governor Clinton, the coming political leader of the state Democracy; and Roseboom, of whom no one expected anything but blind obedience to his leaders. Governor Jay met this council for the first time on February 11, 1801, and the battle began. Governor Jay nominated Thompson

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for the shrievalty of Dutchess. The Democratic majority of the council failed to concur. Jay then nominated in succession seven other names; but none of them pleased the council. Thereupon Jay made nominations for several other offices, upon which the council acted. A week later (February 18) Jay again took up the shrievalty of Dutchess, and his ninth nominee, Williams, was appointed by the council. The historian Hammond (the leading authority upon this period of New York history) indicates the reason: Williams was a Democrat. At the third meeting (February 24) issue was joined upon the right of nomination. Hamilton's theory, adopted by the Federalists in their conflict with George Clinton, was now turned against the Federalist governor by George Clinton's nephew. Jay introduced a series of nominations for the various shrievalties that were to become vacant in the fall. All his nominees were voted down by the council. At this point De Witt Clinton nominated J. Blake for sheriff of Orange. Jay not only refused to put the question, but nominated Nicholson for the office. On this nomination the council refused to vote. The opposing claims, that of the governor to exclusive nomination and that of the council to concurrent nomination, were here, for the first time, unflinchingly pushed to their logical consequences; and the result was a complete deadlock.

Jay adjourned the council, and never summoned it again. He was determined, if possible, to hand the governor's prerogative unimpaired to his successor, and to this end he made another series of attempts upon the central question: Who had the right to nominate? He had already addressed this question to the judges. They refused to give a decision or even an expression of opinion, on the ground that the question was not one of law, but of politics. He now sent a message to the legislature, asking them again to declare what the law was, and whether he ought to share the nominating power with the senators or keep it intact. Jay's very objective mind treated the attempt of the council as perfectly explicable on the ground of political differences, and excusable because the question had been raised several times and never authoritatively determined.

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He renewed his argument on the merits of the case, and ended by warning the legislature that a decision in favor of the senatorial members of the council would give them the exclusive right of nomination. Neither party in either house of the legislature could well support the governor in his plea for the rights of his office, for each had in turn assailed his prerogative. But since a decision was obviously necessary, the legislature referred the question to the supreme power in the state, a convention of the people. The constitution of 1777, however, had made no provision for its own amendment. Legally, therefore, the convention could only declare what it believed the people meant by the paragraph on the council of appointment, and its declaration could have only a moral weight. Practically the convention would declare what it desired, and its decision would be received as final.

The convention met in October, 1801. The tide was still running strongly against the Federalists; in this year the Democratic freeholders elected George Clinton governor; and nearly all the members of the convention were Democrats. Aaron Burr, now Vice-President of the United States, was chosen president of this convention. The case of the council was presented by De Witt Clinton. As both parties had usurped the right of nomination whenever they possessed a majority in the council, and as no one held a brief for the governor, there was little opposition to Clinton's construction, which gave all the members of the council the concurrent right to nominate for office. Only fourteen votes were cast in the negative. Among the fourteen were W. Van Ness, Burr's great defender, and D. D. Tompkins, who afterwards became governor and was a member of the convention of 1821, which abolished the council of appointment. At that time he recalled with pride his vote cast twenty years before. He said: "The convention of 1801 was assembled to sanction a violent construction of the constitution. Then the maxim was to strip the governor of as much power as possible." This was literally true. The first governor who felt the new state of affairs was George Clinton, whose nephew, De Witt Clinton, as leader of the council, from

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this time forth tried to build up a machine by the distribution of patronage.

In considering the evolution of the spoils system down to this point (1801), it should be noted, as Hammond insists, that the quarrel between the governor and council had turned almost exclusively upon questions of reappointment. Officers whose terms, whether fixed by law or by custom, had expired, and who were eligible for reappointment, had been excluded by the council in spite of the protests of the governor; and this had been done to get rid of opponents and confer the offices upon friends of the party dominant in the council. Neither side had as yet attempted, except in rare cases, to remove officials before the expiration of their terms. But as political rivalries became more intense and the party or personal "machine" reached a more perfect development, the practice changed and the "clean sweep" appeared.

Burr is often credited with the first development of the machine, and consequently with all the evils which machine government has entailed. He is charged with the employment of the Tammany organization in New York City to form voters into bodies in which Irish birth or descent formed the bond of union. But at a time when the franchise was still restricted, the city machine built by Burr did not compare in effectiveness with the state machine constructed by De Witt Clinton. And it was Clinton who did more than any other man to extend the use of appointments for partisan purposes by introducing the practice of removal on partisan grounds. Hammond himself, a member of the council of appointment in the following period, a strong partisan and a friend of De Witt Clinton, puts the blame for the corruption of New York politics entirely on the action of the council after 1801, and in a special manner on Clinton. First launched in politics by family influence, De Witt Clinton naturally regarded party organization from the personal side. As secretary to his uncle, Governor George Clinton, he learned the value of patronage in building up a personal following; and his observation of the men who sought office and the means employed to obtain it gave him perhaps

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too low an opinion of human nature. Through his methods of political management, adopted in turn by his opponents, the public service was injured in many respects. Not only were the officials who held at the pleasure of their party chief inclined to devote more energy to the service of that chief than to the duties of their offices; but by reason of the growing intensity of party strife, the qualifications for public office were lowered. Men were not wanted who might turn their influence against their chief; political harmlessness became the principal desideratum in an appointee. Small men only were wanted; and the evil results of the political system established by De Witt Clinton were to strike no man more heavily than Clinton himself, as soon as he tried to carry out a great object.

III. *The Council of Appointment from* 1801 *to its Abolition in* 1821.

There is no period in the political history of New York more interesting than that lying between the elections of Jefferson and Jackson. Party rivalry was so intense and party contests so keen as to bring to the front the very ablest leaders; and these developed a genius for organization and a tactical skill which made their campaigns models for the politicians who fought on larger fields. They represent the highest development of politics as an art. But in spite of the perfection of their art — or perhaps because they regarded politics too exclusively from the artistic and too little from the ethical point of view — these leaders constantly overreach themselves: and in the light of their disasters we are often astonished, not at their selfishness, but at their shortsightedness.

Throughout this period the Democrats were generally in power; and the Democrats were regularly divided into warring factions, based more often on the personal rivalries of their leaders than on any difference of opinion upon matters of state or national policy. The main object in dispute was always the control of the council of appointment and, through the council, of the entire patronage of the state. The patronage of New York City was of growing importance, but since the council

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appointed the mayor of that city, the faction that controlled the state patronage had a strong hold upon the city patronage as well. The complicated details of these twenty years of New York politics do not concern us in the present study. What we have to examine is the part played by the council of appointment, with such notice only of the chances and changes of political strife as are necessary to explain the doings of this body.

The convention, which was to construe article 23 of the constitution and proclaim the concurrent right of the council to make nominations, had not yet met when Governor Jay's term expired and George Clinton succeeded to Jay's office and to his council. From the first, this council acted on partisan lines by carrying through those appointments against which Governor Jay had protested. The sheriffs of Orange and Schoharie (Blake and Vrooman) were appointed because they were Democrats, not because their predecessors had been guilty of any official or civic misdeed. This was but the beginning of the changes which the council meant to make. At first De Witt Clinton, the leader of the majority, advocated the removal of heads of departments only; but he soon suggested the propriety of dividing the minor offices between the parties, in proportion to their numbers. But as the term of this council neared its end, the number of removals increased. In spite of Governor Clinton's protest and refusal to sign the record, new commissions were issued for all the counties, and all Federalists, whether justices of the peace, surrogates, sheriffs, county clerks or other minor officers, were omitted. In the division of the spoils the Livingstons received all the more important state offices and the Clintons received offices in the counties and in the city of New York. The third great faction in the Democratic party, the following of Aaron Burr, went empty-handed. De Witt Clinton had begun the campaign which was to drive Burr from the Democratic party.

In 1802 the council was changed. De Witt Clinton received a United States senatorship and withdrew from the state senate. The interests of his party were entrusted to his brother-in-law, A. Spencer, now attorney-general. The skill with which

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Spencer discharged this duty showed the wisdom of Clinton's choice. The Livingston family, still in friendly alliance with the Clintons, received three justiceships of the supreme court, the other United States senatorship, the mayoralty of New York and the secretaryship of state. A foreign mission was also found for Chancellor Livingston. George Clinton's brother-in-law, Stewart, was restored to the office of district attorney. The Federalists, who were entirely prostrate, and the Burrites, who were proscribed, were rigorously excluded from all offices. The war against the Burrites now necessitated the presence of De Witt Clinton in New York; President Jefferson accordingly appointed Mayor Livingston United States district attorney for New York, and the council of appointment made Clinton mayor of the city. Clinton resigned his seat in the United States Senate to take the mayoralty. He did this because the mayor had great influence and a large salary, and the mayoralty gave him the best opportunity to cripple the Burrites. The decisive trial of strength between the factions took place in the election of a governor to succeed George Clinton, who had been nominated to the vice-presidency of the United States. Against Burr the Clintons and Livingstons set up Lewis, who belonged to the Livingston faction. The result of the election is well known; Burr, defeated by the support which Hamilton and the Federalists gave Lewis, killed Hamilton and ceased to be a factor in politics.

The victory over Burr was followed by a rupture between the leaders of the victorious coalition. The real cause of the quarrel was the employment which Lewis and his council made of the state patronage. In De Witt Clinton's judgment, the Clintons received too little and the Livingstons too much. The question of a bank was merely the pretext. In order to combat the "Quids" or Lewisites, Clinton tried to effect a fusion with the Burrites. The Quids allied themselves with the Federalists. The ensuing struggle was full of vicissitudes. In 1806 Clinton obtained control of the council; and that body, in spite of the protests of the governor, proceeded to turn out those members of the Livingston family who held the offices of secretary of

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state and recorder of New York City, to remove the Lewisite justices of the peace, sheriffs, surrogates and county clerks, and to appoint to the vacant places about 6000 Clintonians. In New York City, on the other hand, the combined anti-Clintonian factions obtained a majority in the common council and forthwith proceeded to turn out of office all the friends of the mayor. The city now begins to influence the course of Albany politics. In 1807 the Lewisites in the assembly secured, by a trade, enough Federalist votes to elect a Lewisite council of appointment. This council began to undo all of Clinton's work by removing him from the New York mayoralty, and restoring the Livingstons to the offices they had lost in the preceding year. Clinton now raised the cry that the Livingstons were only an aristocratic clique; and on this issue he secured the regular nomination for Tompkins, who was to be his tool. Clinton and his brother-in-law, A. Spencer,[1] were successful in defeating the Lewisite faction and electing Tompkins governor. The Clintonians had also secured the assembly, and thus the council of appointment. The council elected in February, 1808, again made a "clean sweep" of all Lewisites, and restored the Clintonians to office. De Witt Clinton again became mayor of New York City. Before its term expired this council removed from office all hostile justices, *i.e.* nearly all the justices.

In 1809 and 1810 the state was carried by the Federalists. When one recalls what admirable lessons they had received from the factions of the Democratic party, their appetite for the spoils is comprehensible and, according to the political morality of the time, justifiable. The Federalist council extended its scrutiny for offensive partisanship to clerks of counties, sheriffs, district attorneys, judges of courts of common pleas, surrogates and justices of the peace, and carried out a general proscription. But the Federalist success was short-lived, and in 1811 the Democratic party again came into power under the leadership of the Clintons. The Federalist appointees were ousted and

[1] Since 1804 Spencer had been a member of the supreme court, but had continued to be active in politics. Through his influence over the justices whom he met at county sessions he had constructed a machine which was of great service to the Clintonians.

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the Clintonians reinstated. After remarking that this change affected all grades of office-holders, from the highest to the lowest, Hammond writes: "But in truth, the public mind had become so accustomed to see men ejected from office on account of their opinions, that such changes ceased to be matters of surprise or to produce any excitement."

De Witt Clinton had the state patronage again under his control. He had long intended to use his supremacy in New York as a means of reaching Washington. He had long aimed at ousting the Virginians from the control of national affairs. He had opposed the policy of the national administration, and in revenge the federal patronage had been used to undermine his influence in New York City. In 1812 he ran against Madison for the presidency and was defeated. Governor Tompkins had already quarrelled with him; and in 1815 Tompkins, with the entire state patronage now in his hands, in union with Tammany, the Lewisites and the Federalists, overthrew Clinton completely and put him out of the Democratic party. It was the vote of New York City that had contributed most largely to his defeat, and Clinton promptly changed his base of operations to the rural counties. He became the leading advocate of the great canal system from the lakes to the Hudson, with which his name is indissolubly linked. Beaten in small politics he turned to greater issues, and appealed to the people with a statesmanlike policy. On this issue Clinton's friends carried the assembly and obtained control of the council; and Clinton himself became governor in 1817. The lesson of the past years had not been wasted on him; and although in control of the council of appointment, he attempted no general proscription of his enemies. But he could not quite forgive the Burrites of Tammany Hall, and a few Tammany office-holders were turned out.

At this time the historian Hammond entered the senate and was elected a member of the council, so that the sessions after 1818 are described by an actor in the party struggles. Van Buren was now the most prominent political manager. He had the Tammany organization behind him and was the leader of

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the "Bucktail" faction. By his adroit management, a council was elected which had the air of being Clintonian, but which, with the exception of Hammond, was Bucktail. This council began to remove Clinton's friends: these clamored for reprisals; and the Bucktails were driven from the party. They in turn "bolted" the regular or Clintonian nominees to such a degree that Federalists slipped into their places. Clinton found his administration hampered by the claims of three factions. The Federalists who had helped the true Clintonians elect the governor were waiting for their rewards; and the Bucktails under Van Buren were trying to detach the Federalists from the Clintonians. Clinton again controlled the council, and did not mean to give the Bucktails offices after they had opposed his nomination. In July, 1819, the council, which for months had been substituting Clintonians and Federalists for Bucktails in all minor offices, removed Van Buren from his office of attorney-general and put into his place a Federalist. From this point on the friends of Clinton were the only recipients of office. The council of 1820 had very few chances to make any removals for political reasons, as "by this time the offices were nearly all filled by Clintonians." Clinton had been driven back into his old methods; and the elections of this year showed at once their strength and their weakness. Clinton himself was re-elected by a great majority, but without any party in the legislature. Clinton owed his election to the use of patronage in the canal counties, to the faith he had kept with the Federalists in the distribution of offices, and to the fact that the Bucktails (now, by Van Buren's clever management, the regular Democratic party) had been forced to accept Clinton's canal policy.

But by this time the system of which Clinton was the author was hopelessly discredited. The council and its methods had fallen into general disrepute. Already in 1818 a Tammany assemblyman had introduced a bill to call a convention of the people for the reform of the council of appointment. The very word convention suggested the question of the franchise; and Hammond claims that he tried to persuade Clinton to overbid

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Tammany by raising this question. This Clinton refused to do; and the Bucktails were prompt to seize the popular issue. Now that this faction controlled the legislature, the demand for a convention was at once formulated. The governor wished that the electorate should decide whether a convention should be called, and that the convention, if called, should submit its work on limited topics to the people. This, however, the Democrats did not want, and finally a convention with sovereign powers was called.

At the same time the anti-Clintonian assembly elected an anti-Clintonian council — the famous "Skinner Council." Its performances were not calculated to lessen the now general dislike of the council of appointment. It repaid De Witt Clinton for his actions in the councils of Jay and George Clinton. Hammond describes Senator Skinner's politics in these words:

> He had been educated in a school of politics which taught him to believe that every legal measure ought to be taken to diminish the power of an opponent, and that to the "victors belong the spoils." This maxim, which has been so much the subject of animadversion and has been for many years denounced by all parties in the state when in the minority, has been practised by each and every party when in the majority. I do not affirm that the practice has been right, but I state as a historical fact that such has been the practice.

This council removed at its first sitting eleven sheriffs; the comptroller, whom even the councils of 1807, 1810, 1813 and 1814 had not removed; and the new attorney-general. It removed several military officers because they were Clintonians, and in this point greatly offended public opinion, because this was the one class of officials that De Witt Clinton had not disturbed. Besides this, it removed the Clintonian mayor and recorder of New York City. The governor refused to sign the council record; but since 1801 the appointments were valid without the signature of the president, as Governors Clinton and Lewis had learned from De Witt Clinton. After a few days' rest, Skinner's council began a proscription which in the end was carried out so thoroughly that in the following year

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no office could be filled without removing one of its appointees. And yet it was only doing what the "common law of party" had come to allow.

The new convention met in Albany, August 28, 1821. It was a very different body from the convention of 1801, and it assembled under very different auspices. In 1801 the convention was limited to a question of construction; and both political parties had, when in power, prejudiced their decision on the question at issue. In 1821, however, the convention could amend the constitution in any point: it was really a constituent assembly. It does not fall within the province of this paper to explain why the convention disregarded Kent's prophetic words and politic warnings and broke down the barriers of the suffrage, nor to discuss the other important changes which it introduced in the fundamental law of the state. What here concerns us is the way in which it dealt with the appointing power.

The convention had organized by electing the Vice-President of the United States (ex-Governor Tompkins) president, and providing for an excellent corps of reporters. The general headings to be discussed were given to special committees, whose reports were discussed in committee of the whole. The chairman of the committee on the appointing power was Martin Van Buren, whom the council had twice turned out of office for partisan reasons. On the 17th of September Van Buren reported from his committee the following:

> That the council of appointment should be abolished; that all militia, with the exception of major-generals and the adjutant-general, should be elected by persons subject to perform military duty; that most of the state officers, such as the comptroller, the secretary of state, the surveyor, *etc.*, should be appointed by the two houses of the legislature in the manner senators of the United States were appointed; that the governor should nominate, and by the consent of the senate, appoint all judicial officers (except justices of the peace, who were to be chosen by the people) and sheriffs of counties; that clerks of courts should be appointed by the courts of which they were clerks; and that no judicial officer should be removed, except by the majority of the senate upon the recommendation of the governor, setting forth the cause of the removal.

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To this report there was an appendix, which showed that each annual council had the disposal of 14,950 offices — 8287 military, and 6663 civil. The military officers, it is true, had seldom been removed on partisan grounds; but on the other hand, the very short terms of some of the county commissions multiplied the number of civil positions which the party in control might and did use for electioneering purposes.

The effect of Van Buren's report on the convention is shown in the unanimous vote of one hundred and two members to abolish the council of appointment. The convention then proceeded (October 1) to consider the report in committee of the whole.

The report proposed a division of the appointing power between the state government and the people. It proposed to vest in the voters the appointment of the greater number of the minor officers. This measure was inaccurately described as a "restoration" to the people of the appointment of their officers. It is not known whether the primitive Germans possessed such an appointing power in the times of Tacitus, but it is certain that their descendants in this country never had it till this convention gave it to them. Of the military offices, 8209 were to be filled by the votes of the militia; the seventy-eight remaining posts were to be kept as state patronage; 3641 civil offices of a distinctly non-political character, which were commonly sought and conducted as a business (*e.g.* notaries, auctioneers, *etc.*), were to be filled by the legislature. The justices of the common pleas and of the peace were to be elected; and then, as county courts, they were to appoint the clerks of the courts and the district attorneys. In all cities except New York, the common council was to elect the mayor and city clerk.

There were still 453 offices not covered by these proposals, and to which the new panacea of election seemed inapplicable. In other words, there was still so much patronage to be assigned. Four solutions were considered: (1) the election by the people of a council of appointment; (2) appointment by the governor alone; (3) appointment by the two houses of the legislature; and (4) appointment by the governor and senate, on the United

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States plan. The committee favored the fourth plan, at least for the higher judicial officers. As regarded the higher military officers, some members of the committee favored appointment by the governor alone.

As regarded the tenure of officers, the committee proposed that in all cases except the legislative appointments, removals from office should be made only for cause stated.

In the main the convention carried these recommendations into effect. There were, of course, divergent views. General Talmadge was opposed to giving the senate any control over the appointing power; while Edwards, the original advocate of the reform, would have "restored the appointing power to the people." The people, however, were not generally looked on as the fit distributors of the offices. This was indicated by the number of propositions for new appointing boards. Among these, Van Buren's scheme of securing for his party the appointment of the county justices is noteworthy. In this plan the governor was to appoint from a list of candidates drawn up by the county supervisors. This plan was accepted, and its effect was so far to perpetuate the old system as to make possible the Albany Regency. The important question as to the sheriffs was settled by giving the people the right to elect them as well as the county clerks. The state officers, as proposed by the committee, were for the most part to be elected by the legislature. What was left of patronage was given to the governor and the senate. Hamilton's prophecy had proved true, that the system of appointment devised at Philadelphia would outlast that constructed at Kingston.

The purpose of this essay is attained. We have seen that the appointing power was from the first the central point of political conflict; that the contest between the crown and the people, in the colonial period, was mainly a struggle for the control of the patronage; that the authors of the first state constitution, realizing the dangerous character of the appointing power, endeavored to divide it between the executive and legislative branches; that this division proved illusory, and the legislature grasped the full control of all appointments. We have

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seen how easily the council of appointment lent itself to the abuse of patronage, and how this abuse increased the importance of single leaders, personalized politics and made the state a battle-field of selfish interests. But we have also seen that this system was condemned as entirely un-American as soon as the great mass of the hitherto unrepresented subjects of the state attained political influence.

In 1825, near the termination of his career, De Witt Clinton recognized, in the following words, the advance that had been made:

> The causes which led to our divisions and distractions no longer predominate. We are emancipated from the thralldom of a system of patronage which formed a component part of our former constitution, and whose direct tendency and inevitable operation were to agitate the community with incessant convulsions; to make personal gratification the standard of political orthodoxy; to render the state the victim of political machinations at home and from abroad; and to convert the very favors conferred by its bounty into the instruments of its vassalage and degradation. . . . The patronage once vested in a council of appointment is now diffused; and political power, which under the former state of things was in many respects concentrated in petty aristocracies and wielded by factious combinations, has been, in a great measure, restored to its authentic source, the great body of the people.

Hammond's words are also worth recalling. In writing of the action of the convention of 1821, he says:

> The adoption of those amendments by the people broke into fragments and virtually annihilated a power which for nearly half a century had distributed in every quarter of the state the spoils of victory of the one party over the other; which, by its sovereign will and pleasure, had prostrated as well the high and exalted state officer in the capital as the humble justice of the peace, secluded in the western or northern wilds — a power which, by elevating some and depressing others, had nourished faction and frequently produced a state of feeling in the public mind which threatened a dissolution of the bonds which unite together a civilized and Christian community. . . . In the first part of these sketches, I have remarked that the principal cause why party spirit had raged more in this than in any other state in the Union, was the peculiar organization of the appointing power under the constitution of 1777. A review of our political history will, I believe, satisfy all intelligent and reflecting men that the proposition is strictly true.

J. M. Gitterman.

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THE NATURE AND CONDUCT OF POLITICAL MAJORITIES.

SIR HENRY SUMNER MAINE'S gloomy forecast of the future of popular governments has made less impression on contemporary thought than any equally serious study of political conditions in modern times. His conclusion that "there is not at present sufficient evidence to warrant the common belief that these governments are likely to be of indefinitely long duration," [1] is accepted by few scholars, even among the "remnant" that would gladly agree with him if they could; while to the Philistines of democracy his demonstration from history of the weakness of their cause is but "the glory of their strength." The incoherence of the argument is a little too obvious, when we are warned at the outset that a wide suffrage "would produce in the long run a mischievous form of conservatism" [2] and "arrest everything which has ever been associated with liberalism," [3] and assured in conclusion that "the natural condition of mankind (if that word 'natural' is used) is not the progressive condition," the normal state of society being "a condition not of changeableness, but of unchangeableness." [4] And again, from the fact that

> if modern society be not essentially and normally changeable, the attempt to conduct it safely through the unusual and exceptional process of change is not easy, but extremely difficult,[5]

we are asked to conclude that government by the many must be transitory; though at the same time it is asserted that

> there is no belief less warranted by actual experience than that a democratic republic is, after the first and in the long run, given to reforming legislation.[6]

[1] Popular Government, p. 53.
[2] *Ibid.* p. 35.
[3] *Ibid.* p. 35.
[4] *Ibid.* p. 170.
[5] *Ibid.* p. 171.
[6] *Ibid.* p. 67.

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That popular governments will be henceforth more enduring, if not more magnificent, than the monarchies and aristocracies of the past, is the more probable as it is the more common belief. The belief is growing, too, that popular power will be less and less regardful of constitutional limitations — less tolerant of ingenious checks and balances. Popular power will be majority power, or, more likely, plurality power. The masses have long believed this. To an increasing extent the scholars believe it, though many of them may regret it.

Regret and apprehension spring naturally from the political ideas transmitted from the great teachers of earlier days. On the whole, the political philosophy of successive generations has held rather closely to the middle way of the Aristotelian doctrine, and it has led us to expect almost anything of popular governments except undue conservatism. Not reactionary thinkers only have dreaded the tyranny of political majorities. It is especially noticeable that American writers of intensely democratic sympathies have feared the power of mere numbers, when unrestrained by local feeling or institutional life. The strongest and clearest presentation of their view was made by Calhoun in his "Disquisition on Government," an essay seldom referred to now, but better deserving of study than some more pretentious works. Its argument is based on a distinction between numerical and concurrent majorities. The concurrent majority is an agreement of several specific majorities, each representing one of the many diverse interests that are included in a large political society. The underlying thought, however, is in part different from that of Mill's later argument for minority representation. Both insist that it is neither democratic nor just to exclude one or more parts of the community or one or more social interests from representation in the government, as, in their belief, government by mere numerical majority does. Both deny that one class or party or section will be more regardful of the rights and interests of the unrepresented in a democracy than in an aristocracy. But Calhoun adds that government by concurrent majority is different in nature from that by majority of numbers. The numerical majority can be ab-

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solute — it can rule by force; concurrent majority presupposes rational compromise, since it is in the power of any interest to veto the action of the others, and this is the exact meaning of constitutionalism.

It is this negative power — the power of preventing or arresting the action of the government — be it called by what term it may, — veto, interposition, nullification, check or balance of power, — which in fact forms the constitution. They are all but different names for the negative power. In all its forms and under all its names, it results from the concurrent majority. Without this there can be no negative; and without a negative, no constitution. The assertion is true in reference to all constitutional governments, be their forms what they may. It is, indeed, the negative power which makes the constitution, and the positive which makes the government. The one is the power of acting, and the other the power of preventing or arresting action. The two, combined, make constitutional governments.[1]

We have before us now two very different beliefs about political majorities: one traditional and familiar, that they require restraint; the other — a very recent one, drawn from highly special historical studies — that their inertia will destroy popular governments by preventing progress.[2] My first purpose is to call attention to the assumptions on which these two beliefs rest. They both assume that political majorities have a nature that can be known, and that acting according to their nature, their conduct will follow courses that can be predicted. But this is only another way of saying that the action of political majorities in the great work of legislation and administration is itself subject to some form of natural law, and that under normal conditions it will not overstep certain bounds, whether artificial limits are imposed or not. If all this is true, the great task of political science for the future will be to discover what the inherent tendencies and self-imposed bounds of popular political action are, and the duty of the statesman will be to

[1] Works of John C. Calhoun, vol. i, pp. 35, 36.

[2] If any reader thinks that I have misrepresented Maine, whose pages contain numerous admissions that the immediate and transient action of democracy may be radical, I reply that these admissions as they stand are inconsistent with the chief thought. The two are nowhere reconciled and co-ordinated. Maine had dwelt so long on the psychology of Eastern and ancient communities that he had become incapable of understanding the psychology of modern democracy.

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shape his policy with reference to them. It is important, therefore, to examine in a scientific spirit the things that have been taken for granted. The reason why this has not been done before now is not difficult to find. Though the assumptions in question have been made in one form or another, not in two or three essays only, but in almost every political treatise in existence, they have been made almost unconsciously. Their implications have not been seen, much less thought out. It could hardly have been otherwise, because the facts and principles that would enter into a more thorough inquiry have only recently begun to attract attention. They do not fall strictly within the province of political science, in the narrower sense of the term. They belong rather to sociology, inasmuch as they are fundamental facts of human feeling and conduct, as conditioned by social relations, by movements of population and by the interaction of society with its environment. They are thus typical of the postulates of the social sciences generally. All build in the same way on easily made assumptions in regard to the psychology and physiology of social relationships. The assumptions may be true, or partially true, or wholly imaginary. Their proper character will come to light when sociology, in the course of that systematic study of the fundamental phenomena of social activity that we may look for in the near future, takes them up for detailed examination.

Now these particular assumptions in regard to the nature and conduct of political majorities are among the most interesting as they are among the most important that the sociologist can study, and therefore my second and chief purpose with the political notions of Maine and Calhoun is to subject their underlying and unexpressed assumptions to a preliminary examination that will show on what lines a more exhaustive study might be made, and, incidentally, to afford a concrete example of sociological interpretation. Let us then try to answer, in general terms at least, the questions: What is the social nature of a political majority? How is it composed? What is its psychology? How is it affected, if at all, by variations of environment and by movements of population, and what conduct will this nature

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impose? Do freely acting majorities rush into radicalism or sink into stagnation or tend to become moderate and progressive? Does the majority rule absolutely, by sheer force of numbers, or do we find that practically a numerical majority is a concurrent majority after all, — a highly composite product of association, brought and held together by that very process of rational compromise that Calhoun extolled?

First of all, then, we must observe that a political majority is a consciously formed association for effecting a consciously apprehended purpose; yet it never is an unmixed product of perfectly independent, reasoned action on the part of all its members. Multitudes of adherents have ranged themselves by personal feeling or class prejudice, or a social instinct that prompts them to act in political matters, as in other things, with this group of individuals rather than with that. Thus the membership of a political majority exhibits a complete gradation of mental development, from a quick and sensitive intelligence at the margin, where independent voting occurs, to stupid bigotry in the unstimulated interior of the mass. Consequently, there is a reasonable presumption that the temper of the whole is neither extremely radical nor ultra-conservative, but very moderately progressive. For a like reason the cohesion of a political majority is conditioned in two very different ways. So far as the party is formed and informed by reasoned opinion, it is affected by all the possibilities and all the difficulties of winning attention and establishing conviction; and these vary immensely, from time to time, with the temper of the public mind, as well as with the character of the question or policy submitted. On the other hand, so far as cohesion is a fact of feeling or prejudice it is conditioned by a thousand circumstances of geographical grouping, occupation and economic inequality — of inheritance, education and religious belief. Accordingly, it is at least probable that a numerical majority is not formed and maintained without much conciliation and mutual concession, and that while it is far from being that concurrence of all interests that Calhoun desired, it is yet the concurrence of so many that its conduct can hardly be-

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come arbitrary without peril of disruption or of complete disintegration.

These probabilities we have now to test by more particular observations. Even as probabilities, not to claim more for them, they would not necessarily hold good of small, or very backward, undifferentiated populations. There the radical or the conservative element might be out of all proportion to counteracting influences, and majorities themselves be almost homogeneous. It is extremely significant, therefore, to find that both the advocates and the opponents of democracy habitually draw conclusions from relatively simple or from special or exceptional social conditions. The prophets of manifest destiny point to the New England town or quote Freeman's account of the Sunday morning meeting of Swiss freemen. Sir Henry Maine assumes that very nearly all the world thinks and feels like a village community under a rajah. On the other hand, predictions of the dangerously radical action of popular power are commonly based on observations of the politics of compact city-states, like ancient Athens, or of modern municipalities, like Paris. They dwell on majority action as it may be seen in versatile populations, living by trade or industry, and often in times of social upheaval. Burke said that a perfect democracy was "the most shameless thing in the world," also "the most fearless";[1] but as his conclusion was avowedly drawn from the French Revolution, a commentator might add that there has seldom been a more fearless induction from inadequate and exceptional facts. Bluntschli in Germany and Lieber in America, as teachers of political science, have warned thousands of pupils that "the populace cannot long retain its virtue after having drunk the intoxicating wine of power,"[2] and that "the doctrine *vox populi vox Dei* is essentially unrepublican."[3] But Lieber's example of all that is unrepublican is France, and by France he means Paris, and by Paris he means Jacobins, while Bluntschli hardly gets beyond Athens; in fact, he says that

[1] Reflections on the Revolution in France (Clarendon Press edition), p. 110.
[2] The Theory of the State, p. 437.
[3] Civil Liberty and Self-Government, p. 407.

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"democracy found its most logical expression in Athens, and its nature can nowhere be better studied than in the Athenian constitution."[1] We may accept these examples for all that they can possibly be worth. We may admit that wherever the Athens of Aristophanes or the Paris of Dumas *fils* is reproduced, there democracy will be shameless; but this gives us no warrant for saying that democracy among the Pennsylvania Dutch or in the Hoosier counties of Indiana will be shameless in quite the same way — certainly none to say that it will also be fearless.

So it is unscientific to argue about political majorities as if their nature and conduct were always the same, irrespective of social evolution or of the size and complexity of states. I want to make my meaning at this point very plain. I do not mean merely that in the large and highly developed state majorities will be constrained by facts of outward circumstance to act as they would not act in the small or backward state. This every one admits. I mean — what has not been so distinctly recognized — that the majority will desire to act in the one case as it would not act in the other. Its character will be different. It will think differently and feel differently.

Whatever popular power may have been in the past, the political majorities that we have to study to-day are co-extensive with every stage of social evolution. For political purposes Paris is no longer France. In the United States, the popular vote in the last presidential election was 11,392,382, of which 5,538,233 votes were cast for Cleveland and 5,440,216 for Harrison. The Democratic plurality of 98,017 included pluralities in all the Southern states; in the Northern commercial ports of Boston, New York, Brooklyn and San Francisco; in the Eastern industrial states of Connecticut and New Jersey; and in twenty-five manufacturing, mining and farming counties of the strongly Republican state of Pennsylvania, not to mention counties of most unlike industries, qualities and densities of population, scattered through the other Northern commonwealths. The division of the total vote by percentages shows

[1] The Theory of the State, p. 432.

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still more strongly the fact that a modern political party is created by the concurrence of minds of every type, of every degree of intelligence and power, and motived by every possible interest. In no state did the Democrats fail to poll at least one-quarter of the total vote. The lowest was 26.96 per cent, in Vermont. In only two states did the Republicans poll less than one-fourth of the total vote. These were South Carolina, 17.20 per cent, and Texas 21.96 per cent. In only twelve states of the thirty-eight did either of the leading parties poll less than forty per cent of the total vote. These, in addition to the three already named, were: Alabama, Republicans, 32.27 per cent; Arkansas, Republicans, 37.67 per cent; Georgia, Republicans, 28.34 per cent; Kansas, Democrats, 30.75 per cent; Louisiana, Republicans, 26.34 per cent; Maine, Democrats, 39.37 per cent; Minnesota, Democrats, 39.64 per cent; Mississippi, Republicans, 25.21 per cent; and Nebraska, Democrats, 39.75 per cent.

While such figures show conclusively the composite nature of a modern political majority, and by implication the fact that its cohesion is liable to fatal strain at a thousand points, the shifting of majorities on questions of personal fitness or administrative policy, when neither private business interest nor class feeling is to any great extent involved, shows approximately what is the proportion of voters whose action is governed to a great extent by opinion in the true sense of the word, rather than by associations, habits and prejudices. These are the reasoning, mobile fringe of the party, easily distinguished from the instinct-guided, slowly moving mass. For examples, we may take the gubernatorial elections of Russell in Massachusetts and Pattison in Pennsylvania in 1890; and of Campbell in Ohio and Boies in Iowa in 1889. Making all comparisons, for the sake of uniformity, with the presidential vote in 1888, the shifting, by percentages, was within these limits: In Massachusetts, in 1888, Cleveland received 44.09 per cent of the total vote; Russell, in 1890, 49.22 per cent. In Pennsylvania, Cleveland, in 1888, received 44.77 per cent of the total vote; Pattison, in 1890, 50.01 per cent. In Ohio, Cleveland received, in 1888, 46.79 per

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cent of the entire vote, and Campbell, in 1889, 48.91 per cent. In Iowa, Cleveland, in 1888, received 44.50 per cent of the whole vote, and Boies, in 1889, 49.94 per cent. It would be an extraordinary upheaval that should result in more decisive political changes than these elections were, and it would be too much to claim that in these the entire effect was produced by a change of opinion. It is, therefore, fair to conclude that the total possible gain or loss to a political party through strictly independent voting does not exceed, under the most favorable circumstances, five per cent of the maximum total vote of a presidential year, and that the number of voters liable to be decisively influenced by mere opinion, apart from personal, class or sectional interests, is not more than two and a half or three per cent of the whole.

But other forces than opinion may on occasion play a determining part, and an examination of the geographical distribution of independent voting will show why. The shifting vote may be very evenly distributed by counties, or according to density of population, or it may be massed in particular sections. The contrast afforded by Massachusetts and Pennsylvania is instructive. Governor Russell was elected by a Democratic vote only 11,348 less than was cast for Cleveland in 1888, while his opponent, Mr. Brackett, received 52,438 less than Harrison. This Republican disaffection, as shown by the vote by counties, was spread with astonishing evenness from one end of the state to the other. The dense manufacturing and trading populations of Suffolk, Essex, Middlesex, Worcester and Hampden and the scattered agricultural and fishing communities of Barnstable, Dukes, Franklin and Nantucket were all affected in the same way in their several degrees. Turn now to Pennsylvania. Here it was not by staying away from the polls, but by an actual transference of votes, that Republicans elected Governor Pattison, since his total vote was 464,209, as compared with 446,633 cast for Cleveland in 1888. Let us see, then, what counties changed their pluralities, and in what others considerable Democratic gains were made. Twenty counties changed their pluralities, namely: Butler, Cameron, Crawford, Elk, Erie, Fayette, Jeffer-

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son, Lackawanna, Luzerne, McKean, Mercer, Mifflin, Montgomery, Northumberland, Potter, Venango, Warren, Washington, Westmoreland and Wyoming. A glance at the map reveals the fact that all but six of these counties lie in the northern belt, where the influences of ancestry, tradition and industry have been conspicuously different from those experienced in the southern belt. They were settled by immigration from New York and New England, to which was added a considerable intermixture of the Scotch Irish. Their industries, especially in recent years, have been of the sort that develop the instinct of enterprise, and accustom the mind to ideas of change and progress. The counties in this list not in the northern belt are in the southwestern corner and in the middle belt, except Montgomery, near the southeastern corner. The latter contains a large suburban population, whose business interests are in Philadelphia, and a large proportion of the independent feeling that was expressed during the campaign in meetings and in newspaper articles in that city was felt at the polls, not in the city proper, but in Montgomery County and the neighboring County of Delaware.

The other counties in which important Democratic gains were made were Allegheny, containing the great industrial cities of Allegheny and Pittsburg and lying on the western border of the state, between Washington County and the counties of the northern belt; Beaver, originally included in Allegheny and Washington; Blair, Bradford, Huntington, Indiana, Susquehanna and Tioga, in the middle and northern belts; Schuylkill, the great anthracite mining county, lying just within the southeastern limit of the middle belt; and Chester, in the southeastern corner of the state.

There remains, besides the city and county of Philadelphia, the great wedge of land extending from the Maryland border well into the interior of the state. Sociologically this is one of the most interesting regions in the United States. It was settled by Germans, Swedes and Welsh, French Huguenots, and people of English descent of a much less aggressive type than those that pushed their way into the state from the north. In

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many parts of this region, the dialect spoken is unintelligible to persons not to the manner born. In others, of course, the English influence strongly predominates, but in all the type of feeling and opinion and the modes of life are unlike those found elsewhere. This entire region was scarcely touched by the Pattison wave. In the returns by counties, we discover hardly a suggestion of independent voting. In the prosperous counties of Berks, Franklin and Lancaster, the Democratic vote actually fell off, as it might in any other non-presidential year, while in Cumberland and York it barely held its own, with gains of less than 200 in each.

From such facts as these it is evident that different degrees of sensitiveness to opinion may be only one phase of fundamental differences of mental quality characterizing the entire populations of large geographical sections. Feelings, instincts, habits, as well as ideas, may be profoundly different. Consequently when questions arise that appeal to emotion as well as to intelligence, a disintegration of majorities is possible to an extent that could never be effected by true independent voting.

What is the implication? Obviously that if in many parts of a country the small portion of a political party that is sensitive to opinion is separated geographically from the portion that is governed chiefly by habit, the cohesion of a majority is almost wholly an affair of feeling rather than of intelligence, since great numbers of voters may be entirely untouched by the currents of opinion that influence others. This is very far, however, from being the whole fact, or even the most essential part of the fact. The cohesion is not only one of feeling apart from opinion; it is one of feeling into which no radical element enters. It is an affair of a very primitive, slowly changing — in a word, a very conservative feeling, and cannot be anything else; since segregated masses of voters that are untouched by the progressive opinions of more active-minded men are equally unaffected by their more radical feelings. But all this means that the conduct of a majority so constituted is strictly conditioned. It must have and will have a conservative regard for a primitive kind of political instincts. If it undertakes progres-

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sive changes, these must be only in matters that do not interest unprogressive communities or disturb their uneventful way of life.

It is desirable, therefore, before going further, to have an answer to the question whether the geographical segregation of the progressive and the unprogressive types of voters is likely to be a general and permanent feature of democratic republics. Sociology can give this answer: The even distribution of the independent vote noted in Massachusetts is exceptional, and always will be so. It involves either homogeneity of population or a very even distribution of heterogeneous elements. This last is the fact in Massachusetts, but not in many other parts of the country. The unequal distribution seen in Pennsylvania is more typical. Not only did the earlier stocks in our population show a strong tendency to local segregation as they moved westward across the continent, but the new elements brought in by immigration are doing the same thing. The outlines of these groupings may change, but the groupings on the whole will be permanent, notwithstanding the increasing facilities of communication and the more perfect diffusion of knowledge. The people of the eastern shore of Maryland, the Tennessee mountaineers, the Northern and the Southern stocks in Indiana, Illinois and Kansas, will retain their characteristics in spite of a thousand levelling influences. For population is not a quiescent mass, even after the great movements of migration and immigration have ceased. A sifting process is ever going on, and it fixes types of character for entire communities. Young men of push and determination that happen to be born and bred in the community that is satisfied to let well enough alone, get out of it as soon as Providence permits and their savings enable them to do so. Young men of the other sort stay where they find themselves, and add their inertia to the common stock. So the progressive are constantly drafted off to where the progressive have already created the better opportunities of life. If, however, the man of progressive instincts is unable for any reason to leave the habitat of his birth, another thing happens. One side of his nature, unused, finding nothing

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to stimulate its activity, remains undeveloped. He lives as much per day as the men about him permit him to live, and no more. He becomes one of them, to know good and evil no more than they.

This sifting and character-shaping process would be sufficient, though unsupplemented by other influences, to perpetuate the geographical segregation of progressive and unprogressive types. Actually, however, it is supplemented in a powerful way. The progressive vote, geographically localized, may be unable to accomplish the legislative or administrative changes it desires over wide areas, that is, in national affairs, and yet in local affairs it may be in command of the situation. From this fact two momentous results follow. First, under the conditions supposed, democracy, however radical, the numerical majority, however powerful, will never destroy or emasculate local self-government. Affairs that are not properly local may be transferred to the central administration, but there need not be the slightest fear that in a nation of wide territorial extent, of varied industries and heterogeneous population, the uninstitutional, inarticulate massing of power that Lieber so dreaded will go far enough to destroy independent local action in matters that are of strictly local concern. Second, progressive legislation and administrative reforms in a great many matters will be accomplished, in a country like our own, by some of the state governments long before corresponding changes are attempted by the national government. State governments will set the example. The abolition of slavery was a perfect historical illustration, because the conditions were exactly of the kind that I have been describing. Banking laws, bankruptcy laws, the regulation of railroad management — are examples from economic interests. But if thus in some states public policy will be at a point of development far in advance of that in the nation at large, it will be even further in advance of that in other states. An examination of the educational, economic and punitive legislation of the different commonwealths of the American Union always reveals an astonishing range of variation.

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Now it is this unequal pressure and influence of public policy that powerfully supplements the natural selection which is all the while increasing the mental mobility of some communities, and confirming the conservatism of others. The natural segregations of population types do not often correspond accurately to state lines, but the influence of county, township and municipal governments is not to be ignored, especially in education, and in many economic matters, including taxation. The effect of state legislation, however, in many cases is to bring about a close approximation of natural divisions even to state lines. It transforms or drives out certain elements; not always directly, by education or the incidence of taxation, but quite as often indirectly, by modifying the medium of feeling and ideas in which the individual is born and nurtured.

We have now the data for a few final conclusions. A political majority of the voters of a large country with diversified resources and occupations and a heterogeneous population, will be governed mainly by a conservative instinct and will be modified only very slowly by opinion. It will carefully respect the fundamental political prejudices of "slow" people. Among such prejudices are those in favor of personal liberty in the broad sense of the word, against the increase of direct taxation, against certain forms of sumptuary legislation and against interference with such traditional political habits as have become a second nature. In America those legal and political practices that we all agree in regarding as fundamental defences of civil liberty are in little danger from the action of popular majorities. The common law, the traditional forms of procedure and such rights as that of public meeting, are quite strong enough in popular respect to be perfectly secure. Written constitutional limitations are of inestimable value for giving definiteness to the action of conservative forces, but it is by the power of conservative habits that the constitution itself is maintained.

So far we seem to be in general agreement with the conclusions of Sir Henry Maine. Popular government, it would appear, is likely to be on the whole unprogressive. The feelings and beliefs that hold a majority together are in substance a faith

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that majority action will defend the elementary rights, the common interests and the established political customs of the people. But mere faith of this sort would impart no power of aggressive action, and without some slight infusion of aggressiveness there can be no progress. Yet that popular governments will be moderately progressive has been affirmed to be probable, and it has been shown that in any majority a progressive mental element is united with the more dominant conservatism. It remains for us to glance at the conditions that enable this element to hold the majority in some degree to a positive policy. While everything must be avoided that conservatism is unitedly or in the mass interested in having let alone, much can be done in matters to which conservatism is indifferent, or which it can gradually be brought to desire.

One means of progress that has played a momentous part in history need not detain us, since its effectiveness is one of the most familiar truths of political science. I refer, of course, to the unifying and stimulating influence of war. Nothing else in the same degree rouses a people to positive action, and its influence is felt in a thousand ways long after the immediate occasion has disappeared. A condition that is more strictly sociological is the flow of population to towns and cities, which bids fair, in time, to give a numerical preponderance to the voters that are in close and constant touch with fresh currents of opinion. But there is yet one other condition that is even more definitely sociological, and to this I wish chiefly to call attention. That the organization of numbers of men for any form of co-operation is subject to psychological laws, has been from the outset our assumption, either tacit or express. A law not mentioned hitherto, but now to be recognized as one of controlling influence, is that of the relation of activity to cohesion and to co-ordination. In the individual mind a logical association of ideas cannot be perfectly maintained when mental activity slackens. No more can an association of individuals be held together without continuous agitation or discussion. A church or a club, a scientific association or a philanthropic guild, fails to hold the allegiance of its members when it ceases

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to stimulate their thought. However predominant feeling may be in the social bond, it is never wholly dissociated from ideas and beliefs, even in the most ignorant individuals or communities. Whatever power of thought there is must be enlisted and kept in action, or feeling itself ceases and all interest disappears. The populations of large geographical sections may be absolutely unresponsive to some movements of opinion, and it may often be impossible to put them in touch with the ideas of the larger world; but now and then they must be reached, their power to respond must be put to the test — or they will cease to have any part in the affairs of the world beyond their local borders.

A majority, then, cannot be held together, even by bonds of prejudice and habit, if it follows too long a passive policy. Mr. Spencer has earnestly protested in all his political writings against the over-activity of parliaments. Yet as a psychologist and sociologist he has done more than any other thinker to enable us to understand that, since all organic cohesion is conditioned by growth, a policy of ceaseless activity is absolutely necessary, as a fact of social psychology, if any political co-operation is to be kept up. Moreover, the policy must be one that appeals to the people as well as to the leaders. It must awaken popular interest and quicken popular thought.

Summing up our conclusions, we have these net results: A numerical majority in a differentiated society, occupying an extended and diversified geographical area, is a concurrent majority in composition, though by no means a perfect one. It is held together more by feeling than by opinion, and conservative feeling predominates in respect to all fundamental rights and established political usages. But the cohesion of feeling and habit will not endure if there is no intellectual activity and no growth whatever of opinion. The majority must, therefore, have a policy of the sort that admits of discussion and fosters it. In short, the cohesion of a majority is conditioned at one limit by conservative feelings that cannot be contemned, and at the other limit by the necessity of pushing a policy of activity or progress as far and as fast as the inertia of the mass will permit.

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A political majority, therefore, has a nature that can be described in terms of the laws of social psychology, and its conduct is subject to natural limitations. It must follow a mean course between the mischievous conservatism of Maine's prognosis and the shameless radicalism of Burke's or it will cease to be a majority. As social structure becomes more complex, the difficulties of holding the diverse elements of a majority together in a working co-ordination rapidly increase. All other things remaining the same, the inertia of conservatism would increase, and political stagnation would bring progress to an end. National disintegration would follow. But other things do not and cannot remain unchanged. As the difficulties of maintaining party cohesion increase, the necessity of adhering to a positive policy becomes more imperative. Agitation must be kept up. The "campaign of education" must be vigorously pushed. No fact in the later history of party politics in England stands out more clearly than this. In our own country it has been disguised somewhat by the overwhelming strength of the "spoils system," but it is becoming apparent now even to the most "practical" of politicians. Progress in this form brings its own safeguards with it. As voters become responsive to opinion, they become capable of independence. Consequently, as party policy becomes positive, it is compelled at the same time to become ever more heedful of the teachings of experience. While conservative feeling will protect elementary rights and useful customs, the slowly acquired power to learn from experience will enable popular governments, as time goes on, to rectify their inevitable mistakes in those difficult affairs of industrial legislation and finance in which undisciplined public opinion at first so easily goes wrong. The unequal geographical distribution of the progressive part of the population will always aid the formation of sound judgments from experience, since many costly experiments will be made at first locally, on a relatively small scale.

FRANKLIN H. GIDDINGS.

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BOEHM-BAWERK ON CAPITAL.[1]

THE question which Dr. Boehm-Bawerk seeks to answer is this: Why does capital generally yield a surplus value, *i.e.* something over and above itself, — not merely more goods, but more value, more exchange power, so that the possessor of capital can command an income proportionate to his capital, either with or without personal exertion of his own? In his earlier treatise, *Capital and Interest*, the author attacks all previous theories on this subject by putting to each of them in succession certain test questions, — such, for example, as these: You say that interest arises because capital is productive. Of what is capital productive? It may be productive of goods greater in amount than itself, or equal to itself, or less than itself. It may be productive of goods whose power of commanding other goods in exchange is highly variable. We want to know why capital commands more *value* than itself. It is no more an answer to this to say that capital is productive than to say that God is good. Again, you say that abstinence must have a reward; that the capitalist abstains from consuming his capital, and for this he must be paid; otherwise he would consume it, and so capital would disappear and the world's progress would come to an end. But has there been any agreement among mankind to reward capitalists for abstinence? If so, how much must they be paid? Really there is no *must* about it. All that can be affirmed under this head is that when people find interest offered to them, together with security for the principal, they perceive that it is worth their while to abstain from consuming their capital. In other words, abstinence is a consequence, not a cause of interest.

[1] The Positive Theory of Capital. By Eugen von Boehm-Bawerk. Translated with a Preface and Analysis by William Smart, M.A., Lecturer on Political Economy in Queen Margaret College, Glasgow. Macmillan & Co., 1891. [For a review of the German original, see POLITICAL SCIENCE QUARTERLY, IV, 342. — EDS.]

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The author's theory of interest is very simple. "Present goods are, as a rule, worth more than future goods of like kind and number. This proposition is the kernel and centre of the interest theory which I have to present" (page 237). This is a fact of experience so nearly universal that we would not thank anybody for taking pains to prove it, and it seems at first blush to account satisfactorily for the phenomenon of interest. But when examined more closely it becomes less satisfactory. We say: Present goods are worth more than future goods. One hundred dollars in hand is worth more than one hundred dollars a year hence. These propositions are identical. Now if we say that interest exists because one hundred dollars in hand is worth more than one hundred dollars a year hence, do we really advance matters? And would the mere fact that present goods are worth more than future goods account for the phenomenon of interest? Hardly. Among barbarous tribes present goods are worth infinitely more than future goods; yet interest does not exist there in the form of loans, and very slightly in any other form.

In the opinion of the author a theory of interest must rest upon a secure theory of capital. Hence the present work, the *Positive Theory of Capital.* Book I is on the nature and conception of capital, and Book II on capital as an instrument of production. Both are simple and easily understood, and both are necessary to a complete knowledge of the subject treated. There have been many definitions of capital, and the question before us is not which definition is absolutely right, but which one is right for our present purpose of ascertaining the cause of interest. Here everything depends upon the view we are taking of capital. For some purposes we may agree that land is capital, that muscular power is capital, that acquired skill is capital. But for the present purpose the author shows that all these must be cast out of the reckoning. More doubtful is his contention that supplies of food and clothing, by which labor is sustained during the process of production, should also be cast out. These, he thinks, being part and parcel of what every community requires to sus-

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tain life, and which must be had and consumed whether production goes on or not, are not the things which we have in view when we ask why surplus value issues out of capital.

The essential fact is that roundabout methods of production are more productive than direct methods. They yield larger results. To get water from a spring by dipping it with your hand is the direct method. To get it by constructing water works leading to your house is the roundabout and far more productive method. Now capital consists of means and appliances for working in the roundabout and more productive way. The author considers this an empirical fact which political economy does not and cannot show *a priori*. Nor is the economist bound to show *why* roundabout (capitalistic) methods are more productive than direct ones. Nevertheless the author says: "I attach particular value to explaining its cause, and after what has been said as to the nature of production this should not be very difficult." The cause is merely that man can harness nature to his wagon. Although his strength does not enable him to rend rocks by direct application, he knows how to make wedges and hammers and gunpowder. He knows how to take the roundabout road. The author's view is that capital consists of "produced means of production," or a group of intermediate products brought into existence by labor to assist in further production. This view excludes land, labor and subsistence from the category of capital, but it includes tools, buildings and all raw materials that have had any labor expended upon them. Here is the thesis respecting capital:

> All consumption-goods which man produces come into existence through a co-operation of human power with natural powers, which latter are partly economic, partly free. By means of these primary productive powers man may make the consumption-goods he desires either immediately or through the medium of intermediate products called capital. The latter method demands a sacrifice of time, but it has an advantage in the quantity of product, and this advantage, although perhaps in decreasing ratio, is associated with every prolongation of the roundabout way of production [page 91].

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On page 86 the assertion that every extension of the productive process leads to some surplus result is qualified by the words, "so far as it is wisely chosen." This excludes every case where no surplus result follows, every such case being one where the extension of the process was not wisely chosen. It excludes moreover all cases where shorter and more direct and less costly methods yield larger results than the former long and roundabout methods; as, for example, boring for oil instead of sending ships to the Arctic Ocean to catch whales. Most of the new applications of electric power are more direct and less roundabout than the steam machinery that they have superseded. Obviously, in any of these cases an extension of the process back to the old roundabout method would not be wisely chosen. Here we have something which looks like an identical proposition, *viz.*, every extension of the productive process leads to a surplus result, provided it does not lead to a contrary result. But we must not pronounce a hasty judgment, since we shall meet this proposition again.

"To obtain the basis for the principal part of our work — the explanation of interest — we require to go into the theory of value," says Dr. Boehm-Bawerk. Accordingly he goes into the theory of value to the extent of sixty pages. I confess that I find these pages very hard reading; they offer in this respect a marked contrast to the same author's presentation of the same subject in the *Annals of the American Academy of Political and Social Science* (January, 1891). In the last-mentioned article, the theory of value common to the Austrian school, and which English and American economists couple with the name of Jevons, is stated in few words and with admirable clearness. In the treatise before us it is so involved and complicated that after reading it with the best attention I can command, I am not sure that I understand it. I fear lest I may fall into the same kind of difference with the author that he has fallen into with Professor Knies, as to whether he rightly understood what Professor Knies said (page 288). That the author is aware of some obscurity in his treatment of the subject appears from the apology which he makes for it on page xxvii of his preface.

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With some trepidation I shall attempt to state briefly this theory of value, which is most commonly called the theory of "final utility," or, as Dr. Boehm-Bawerk prefers to call it, "marginal utility." If America produces a surplus of wheat, that surplus will be sold abroad, and the price of the whole crop will be identical (freight charges excepted) with the price of the surplus, however small that surplus may be. But if there is no surplus for export, or if foreign countries have produced all the wheat they require, there will still be in America different uses to which wheat may be applied, such as distilling, starch making, poultry feeding, *etc.* The price of the whole crop will be the price at which it sells for the least pressing requirement, and will vary as the latter varies. Thus the surplus over and above what is needed for human food measures the exchange value of the whole. This is the "final utility" theory of value as I understand it. At bottom it makes the estimation or appreciation of buyers, instead of cost of production, the determinant of the value of an article in the market. At present the field of economics is divided between the supporters of the final-utility theory and those of the cost-of-production theory. Although the weight of authority is largely with the latter, my own preference lies with the former; but I cannot consider the phrase "final utility" an apt one. There are always two ends to a line, and the word final does not tell us which end is meant. When we speak of final causes we mean first causes. When we speak of final utility we mean last utility, or rather least utility. Why should we not then say minimum utility, instead of final utility, or marginal utility, which Dr. Boehm-Bawerk prefers?

Coming now to the proposition already quoted, that present goods are worth more than future goods, we can dispense with argument to prove this, as we can dispense with argument to prove that a bird in the hand is worth two in the bush. The reasons why present goods are worth more than future goods, according to Dr. Boehm-Bawerk, are three, *viz.*, (1) want of imagination, (2) defect in will, and (3) the uncertainty of life. We do not picture to ourselves our future wants as vividly as

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we feel our present wants. Even if we do, we may be lacking in will power to deny ourselves now in order to enjoy hereafter. We know that we shall not be living to enjoy any kind of goods a hundred years hence, probably not fifty, perhaps not ten. Since we do not put the same estimate on future as on present wants, when we exchange present for future goods there is an agio on present ones. A loan without interest is a gift of this agio.

At page 260 we come again upon the proposition concerning roundabout and lengthened processes of production, which is now stated in these words:

> It is an elementary fact of experience that methods of production which take time are more productive. That is to say, given the same quantity of productive instruments, the lengthier the productive method employed, the greater the quantity of products that can be obtained. In previous chapters we went very thoroughly into this, showed the reasons of it and illustrated and confirmed it by many examples. I venture to think we may now assume it as proved.

There is no saving clause here for cases where the lengthened process is not wisely chosen, but we must introduce it. That is, we must understand that this principle applies only to the cases that it does apply to. We must understand also (for the author expressly mentions it) that it has its limits in another sense. It does not apply to infinity or to centuries, because there is no way of continuing the same piece of work for an indefinitely long period. "Trees do not grow up till they meet the sky." Yet he says on page 265: "We should obtain the greatest number of units (of product) by an infinitely long production process or a process lasting a hundred or two hundred years." What are the processes that *can* last so long? The only one I can imagine is the planting and growth of trees.

For purposes of illustration Dr. Boehm-Bawerk takes a seven years' period and assumes that a month's labor which might yield 100 units of product immediately, would yield 200 units at the end of a year, 280 units at the end of two years, 350 at the end of three years, and so on, by a sort of law of diminishing returns, till the end of the seventh year, when the number of

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units would be 500. It is understood of course that the month's labor in each case is left dormant for the periods named, and that time alone does everything beyond the first month.

In order to show that value of product as well as quantity of product follows this law, we have another set of computations, accompanied by explanations in the text. This is probably one of the "long, difficult and troublesome" passages apologized for in the preface. Dr. Boehm-Bawerk has here given some countenance to the newest school of political economy (very flourishing in the United States) which may be called the "unintelligible school"; our regret is the more profound since this is the only work of the author which is open to such criticism, all his other writings with which I am acquainted being models of perspicuous clearness. I shall assume *ad hoc* that he has proved that value of product follows the same rule as quantity of product, whatever that rule may be.

In Book VI the author elaborates the conception that a loan is an exchange of present goods for future goods, the difference in time conferring an agio on present goods, just as a difference of place (between London and New York, for example) may confer an agio, or premium, on money in one place over the same kind of money in the other place. No valid objection can be advanced against this. Dr. Boehm-Bawerk has sufficiently answered Professor Knies's contention, *viz.*, that an essential feature of every exchange is a difference *in kind* between the things exchanged, — that we exchange bread for coal, not bread for bread or coal for coal. But it is not difference of kind, it is the *advantage of the exchangers*, that constitutes the essential feature of an exchange, and this may be secured by difference of time or of place, as easily as by difference of kind.

In the contemplation of the capitalist producer the materials he buys, the labor he hires, the machinery he uses, are the embodiment of future goods. They cannot have a higher value than the goods which are to come out of them, which, as we have seen, have a less value than present goods of like kind and

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number. This is the explanation of profit in capitalist undertaking. The capitalist pays present goods and gets future goods in exchange. The difference between them is a gross profit, which includes interest and wages of superintendence. All interest must be sought in the gains of capitalist undertaking. If there were no such gains interest would cease. Dr. Boehm-Bawerk seeks to assimilate the rent of land to interest, but the attempt is hardly a happy one.

Considerations of space forbid analysis of Book VII, on the "Rate of Interest," which is not essential to the theoretical part of the work. Chapters IX and X of Book VI, on the "Socialist Conception of Interest," are very clear and cogent, and are equally acceptable whether we agree with the author's theoretical conception of the birth of interest or not.

We are now prepared to put the parts of this conception together. The question to be answered is found on the first page of the author's *Capital and Interest:*

> It is generally possible for any one who owns capital to obtain from it a permanent net income called interest.
>
> This income is distinguished by certain notable characteristics. It owes its existence to no personal activity of the capitalist and flows in to him even when he has not moved a finger in its making. Consequently it seems, in a peculiar sense, to spring from capital, or, to use a very old metaphor, to be begotten of it. It may be obtained from any capital, no matter what be the kind of goods of which the capital consists: from goods that are barren as well as those that are naturally fruitful; from perishable as well as from durable goods; from goods that can be replaced and from goods that cannot be replaced; from money as well as from commodities. And finally it flows in to the capitalist without ever exhausting the capital from which it comes and therefore without any necessary limit to its continuance. It is, if one may use such an expression about mundane things, capable of an everlasting life.
>
> Thus it is that the phenomenon of interest as a whole presents the remarkable picture of a lifeless thing producing an everlasting and inexhaustible supply of goods. And this remarkable phenomenon appears in economic life with such perfect regularity that the very conception of capital has not infrequently been based on it.
>
> Whence and why does the capitalist, without personally exerting himself, obtain this endless flow of wealth?

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The answer is that present goods are, as a rule, worth more than future goods of like kind and number. When the author goes on to say that "out of this fact spring, naturally and necessarily, all the manifold forms which the phenomena of interest take," we must consider that he looks upon this fact as the *vera causa* of interest. At all events I should have so considered, had he not immediately proceeded to push the inquiry back by one stage and show why present goods are worth more than future goods. The reasons given are, he tells us, rather in the domain of psychology than of economics (page 254). Yet they are veritably economical if they have a distinct influence on the *οἰκονομία* (housekeeping) of mankind. As indicated above, we cannot accept the superiority in value of present goods to future goods as a cause, since that is only another way of stating the problem. We must therefore look closely at the three assigned causes of that superiority. These are defect of imagination, defect of will and uncertainty of life.

Are we authorized to say that interest exists because men do not sufficiently discern and appreciate their future wants, or have not the will-power to curb present appetites, or because they must die, or for all those reasons combined? Is it not true, on the other hand, that the overwhelming majority of civilized mankind have the keenest perception of their future wants? Is there anything that they are more concerned about? Does not the provision for future want occupy by far the largest share of the attention of all but an imperceptible fraction of civilized peoples? Who are they whose imaginations are defective on this point? Scholars, clergymen, artists and philanthropists (and not all of these) may be put in this category. They are offset, if not in numbers, certainly in economical importance, by those who may be fairly called misers — men whose minds are so intensely fixed on future wants, that they do not satisfy present ones.

And who are they whose defect of will leads to the consumption, day by day, of all that they have or earn, thus enhancing the demand for, and value of, present goods as compared with future goods? Defect of means must not be confounded here

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with defect of will. There are large numbers of people in every country who live from hand to mouth because that is the only way they can live. We are not concerned with this class now, but only with those who, having a surplus of present goods sufficient to lay up something, fail to do so because they cannot control their appetites. We grant that these are not an insignificant class; yet we should not rate them higher than the proportion who reach the poor-house as against the proportion who have money in the savings banks.

Finally, how much importance must we assign to the shortness and uncertainty of life as a factor determining the demand for, and value of, present goods over future goods? Most producers (and we are now concerned only with producers — with those who could save, but who fail to do so because of the uncertainty of life) have children or others dependent on them. Those who have none frequently have the design of conferring benefactions on the human race after they are dead. Parents generally have a strong desire to provide for their children, so that the uncertainty of life, instead of operating as a deterrent to saving, is one of the most powerful incentives to it. Life insurance is founded upon this instinct and is only one of its many manifestations.

The large place assigned by Dr. Boehm-Bawerk to roundabout and lengthened processes of production has already been adverted to. On page 84 we read:

> On the whole it may be said that not only are the first (roundabout) steps more productive, but that every lengthening of the roundabout process is accompanied by a further increase in the technical result; as the process, however, is lengthened, the amount of product, as a rule, increases in a smaller proportion.
>
> This proposition also is based on experience, and only on experience. What it says must be simply taken as a fact of the *technique* of production.

In a foot-note to page 86, however, we find an allusion to a current of experience running in the opposite direction.

> But often a happy invention may lead to a better, and at the same time shorter, way of production, such as the manufacture of certain dye-

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stuffs from chemical instead of plant bodies. However elaborate the former may be, it is still certainly far more direct and speedy than a manufacture which has to wait on tedious processes of growth.

This introduces us to what I consider the most marked and distinguishing feature of the modern industrial world. That feature is not the lengthening of processes of production, or the employment of larger capitals and more roundabout ways to produce a given quantity of products, but the shortening of processes, the employment of less capital and less roundabout ways. One or two such instances have been mentioned.

The fact is that the two methods of production — the longer and the shorter, the more roundabout and the less roundabout — hold the realm of mundane affairs together, but with a preponderance in favor of the latter. The printing business supplies an apt illustration of both. Fifty years ago the printing of newspapers was done by hand presses. Then came the invention of the rotary press. This was a roundabout process requiring a large expenditure of capital, but it yielded an enormous result. But this press required a man to feed each sheet into the machine twice (to print the two sides), and another man to take each sheet after it came out and put it through another and separate machine in order to fold it. It required also that the sheets should be cut to the required size at the paper mill, and that the paper should be skilfully dampened before it was put in the hands of the press-feeders. Now the old rotary press with all its costly appendages is discarded, and a new machine is introduced which takes the paper from the manufacturer's original roll and delivers papers more rapidly than before, dispensing with feeders, wetters and folders. Moreover, it prints both sides at once, thus doubling the result at a stroke. Still further, if the newspaper requires a supplement on particular days, *i.e.* an enlargement of its normal size, the new press adds this without any extra cost. In short, the new "perfecting" press does the work of at least three of the old presses and does not cost any more; in fact it costs less, if we take into account all the supplementary machinery of the old press.

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Now we can imagine that this result of three for one might have been obtained by a roundabout capitalistic process; that is, by the construction of a machine much more expensive than the old one and producing what we now get, namely, papers printed on both sides and supplements to boot, all folded ready for distribution. But what mankind is ever striving for is not to get more with more, but to get more with less. If we should extend our inquiries into the modern processes of making steel, the results would be still more surprising than those in the case I have mentioned. Indeed time would fail us to describe them. As I write these lines the news comes that motive power has been carried from the falls of the Neckar to the city of Frankfort-on-the-Main on three ordinary telegraph wires, which at former stages of the art would have required a mass of copper of much greater cost.

In view of such considerations it cannot be regarded as an empirical fact that roundabout and lengthened processes are more productive than direct processes. Nor could we consider this a cause of interest, unless it were a universal rule, which the author admits is not the case since he limits it to instances in which the roundabout process is "wisely chosen."

As a matter of fact the cause of interest is to be found in the very saving clause which Dr. Boehm-Bawerk here introduces. "Wisely chosen" means that a man's intelligence has enabled him to get more value out of a given supply of materials, labor and machinery than he put into it. He might have got less value out of it. Those who do not possess intelligence generally do get less, and in due time their names adorn the list of bankruptcies. There is no universal rule that the owner of capital can obtain from it a permanent net income called interest. The heads of all the capitalists in the world are aching and their nerves are shaking lest their income shall cease to be permanent and shall disappear altogether. A really permanent income is what all capitalists are doubtfully striving for, and this is the reason why the loans of first-rate governments are so eagerly sought, and why they command so high a premium. The interest on these loans, being collected as taxes from the whole com-

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munity, rests upon a safer basis than interest in general. It is, in fact, in a quite separate category, since such borrowings are not usually for purposes of production but rather for those of war and waste. But even government loans need to be "wisely chosen," as every stock exchange in the world can attest. The Argentine debt wrecked one of the largest houses in the world a little less than a year ago, and the effects of that crisis are felt in every money market of Europe and America to this hour.

In a passage quoted above Dr. Boehm-Bawerk qualifies his statement of the problem in hand by the word "generally," thus:

> It is *generally* possible for any one who owns capital to obtain from it a permanent net income called interest.

On page 116 of *Capital and Interest*, while pressing the productivity theories to the wall, he puts the problem thus:

> The theorist, then, who professes to explain interest, must explain the emergence of surplus value. The problem more exactly stated will therefore run thus: Why is the gross return to capital *invariably* of more value than the portions of capital consumed in its attainment? Or in other words: Why is there a *constant* difference in value between the capital expended and its return?

The difference between "generally" and "invariably" is a vast difference here, but I cannot accept either the one or the other statement as a fact in mundane affairs. A few words from Bagehot will explain why. Says this acute observer:

> In our common speculations we do not enough remember that interest on money is a refined idea and not a universal one. So far indeed is it from being universal, that the majority of saving persons in most countries would reject it. Most savings in most countries are held in hoarded specie. In Asia, in Africa, in South America, largely even in Europe they are thus held, and it would frighten most of the owners to let them out of their keeping. An Englishman — a modern Englishman at least — assumes as a first principle that he ought to be able to put his money into something safe that will yield five per cent, but most saving persons in most countries are afraid to put their money into anything. Nothing is safe to their minds; indeed, in most countries, owing

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to a bad government and a backward industry, no investment, or hardly any, is really safe. In most countries most men are content to forego interest; but in more advanced countries at some times there are more savings seeking investment than there are known investments for; at other times there is no such superabundance.[1]

Then he quotes a well-known passage from Macaulay in which the fact is mentioned that the father of Pope, the poet, when he retired from business in London, carried to his retreat in the country a strong box containing nearly twenty thousand pounds, from which he took from time to time what was required for household expenses, — this on account of the paucity of investments.

So it appears that the word "generally" needs a further qualification. It must be restricted to countries which have intelligence and good government. Since good government is the product of intelligence, we may say that interest depends upon intelligence both in general and in particular: in general because in unintelligent countries it does not exist, or exists only as an exception; in particular because only the intelligent members of the community can make capital earn interest. It is only such persons indeed who can keep capital itself from going to waste; for capital unused is assailed by moth and rust and soon perishes. It requires constant renewal, and intelligence only can renew it. Still more and higher intelligence is required to make it yield a surplus value over and above its own renewal, which surplus we call interest.

Let us now ask what is meant by the "productivity of capital." It cannot mean that a bow and arrow will bring down any game without a man behind them, or that the iron works of Krupp will yield a surplus result without the directing skill of Krupp or of somebody else. Yet in common parlance, and especially in socialist parlance, the meaning is hardly to be distinguished from that. There is nothing more common in the controversies of the day than the phrase "conflict of labor and capital." We are told on the one hand that capital oppresses labor, and on the other that the interests of labor and capital

[1] Lombard Street, chap. vi.

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are identical. Probably few persons who hurl those maxims back and forth understand what they mean. There is no conflict between labor and capital, since capital is inert; it cannot come into conflict with anything, least of all with labor. But there may be and often is a conflict between laborers and capitalists respecting the rate of wages to be paid by the latter to the former. That is, there is a conflict between two men, or groups of men, whose circumstances are different only in the fact that generally one of them can wait longer than the other. Capital does not oppress labor, but capitalists do sometimes refuse to employ laborers until hunger and cold have compelled the latter to work for less pay than they ought to have, or think they ought to have. Here again persons and only persons are concerned. The interests of labor and of capital certainly are identical (if capital can be said to have any interests), but the interests of laborers and of capitalists are diametrically opposed to each other, because it is for the interest of the laborer to get as much as possible for his labor, and it is for the interest of the capitalist to pay as little as possible for it.

If the productivity theory tells us that interest exists because capital is productive, it is wrong, of course; since the bow and arrow cannot, of themselves, bring down any game, nor the iron works of Krupp, of themselves, produce any surplus result, or any result at all, except that of accumulating rust and eventually tumbling down. But if the productivity theory tells us that interest exists because there are men in the world who know how to get a surplus result from the use of capital, I apprehend that that is the true explanation of interest. These "captains of industry" are rare in every community, but they are sufficiently numerous as yet in civilized countries to absorb the savings of those countries and to put them to profitable use as tools of reproduction. Out of this profitable use or surplus result they are enabled to pay a certain rate of hire, or interest, for the use of tools. This rate of hire is determined by the law of supply and demand. It varies with different countries, and it varies with different times in the same country. The captains of industry do not always succeed. A certain proportion

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of them fail every year, the capital in their hands not only yielding no surplus result, but being completely dissipated and struck out of the world's ledger. Since, however, a sufficiency remain who do succeed, interest continues to exist as a phenomenon of human affairs, but not as a universal phenomenon. Without the particular kind of intelligence which Mr. M. L. Scudder, Jr., aptly calls the "value sense," interest could not exist any more than poetry could exist without the poetic temperament, or art without artistic taste.

In *Capital and Interest* (page 123), Dr. Boehm-Bawerk puts this question to the productivity theorists:

> Suppose a commodity requires for its production labor and the use of land to the value of £100, and suppose that it takes so long to make the commodity that the capital advanced to purchase those services (in this case £100) is not replaced for a year, why is the commodity worth not £100 but more — say £105?

If this question were put to a man of affairs on the street he would probably say:

> Because the man making the commodity was a smart fellow. He understood his business. If he had not been a smart fellow and had not understood his business the product might not have been worth even the original £100, but only £90.

It should be observed too that the same persons are more capable of getting surplus value from capital at some times than at other times. M. de Lesseps, for example, managed £20,000,000 at Suez in such a way that it yields surplus value, but he managed three times that amount at Panama so that it does not yield surplus value, or value of any kind.

While I am not able to accept the author's conclusions I yet agree entirely with Dr. James Bonar[1] that his book must be regarded as one with which all subsequent writers on interest will have to reckon. Every reader must have the highest admiration for his learning, his candor, his courtesy to opponents and his (generally) pellucid style.

HORACE WHITE.

[1] In the *Quarterly Journal of Economics*, April, 1889.

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REVIEWS.

Labour and Life of the People. Volume II: *London* (*Continued*). Edited by CHARLES BOOTH. London, Williams & Norgate, 1891. — 607 pp. With an appendix (72 double pp.) and five colored maps under a separate cover.

Since the appearance of their first volume, dealing with East London, in 1889, Mr. Booth and his band of fellow-workers have been pursuing their herculean task with extraordinary energy and despatch. In an article which appeared in this QUARTERLY in September, 1890, an explanation was given of the general character of the undertaking. Mr. Booth aims at an exact qualitative and quantitative analysis of London poverty. His method of investigation is incomparably more thorough than any hitherto employed; and his results are incontrovertible. We may differ from him as to the conclusions to be based upon his figures; but the figures themselves are beyond question, and the facts that they express are most significant.

The first volume contained a number of minute descriptions of various fields of employment; and these to the economist were of the utmost value. But the part of the book that was of most interest to the general public was that which distinguished the various social grades in the population, and stated the number to be assigned to each. This was of such vital significance, in view of current discussions, and the results were so different from ordinary presuppositions, that Mr. Booth has wisely determined to publish his statistical results for the whole of London, without waiting for the monographs on the various trades to accompany them. His social classification, it may be remembered, was as follows:

Class A: occasional laborers, loafers and semi-criminals.
Class B: the very poor, with casual earnings.
Classes C and D: the poor, with weekly incomes of from 18*s* to 21*s*.
Classes E and F: the regularly employed and fairly paid working classes.
Classes G and H: the middle classes.

His results for the whole of London may be thus presented, — with those for East London alone placed by their side for the sake of comparison:

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	LONDON.		E. L.	
A	.9 per cent	the "poor" 30.7	1.2	35.2
B	7.5 " "		11.2	
C and D . . .	22.3 " "		22.8	
E and F . . .	51.5 " "		55.9	
G and H . . .	17.8 " "		8.9	

These estimates furnish abundant food for reflection. It is consoling to find that the loafing and semi-criminal class is so small; and that of the working population more than a half can count upon regular and tolerably well paid employment. It is disquieting on the other hand to discover that in the amount of "poverty," East London is not so much worse than other parts as we had imagined. Mr. Booth owns himself surprised at the result, and finds South London and the district about Holborn mainly responsible.

A great part of the present volume (pages 40–235) is occupied with a classification of streets and a detailed description of certain typical localities. The judgment passed upon each is indicated by a scheme of colors on the maps in the appendix. Mr. Booth has carried out with the same exactitude for the whole of London, the method of graphic representation which was one of the most striking features in his treatment of East London: and I can only repeat what I said then, that maps of this kind ought to be prepared and revised from time to time by the charitable workers in every great city. But into the particulars of this review of London, street by street, it is impossible to enter. Here is infinite material indeed for economic speculation; but the ordinary reader is dazed by the multitude of facts and their sombre monotony, and can hardly do more than read a page here and there.

The rest of the volume is of a rather miscellaneous character. One chapter is devoted to blocks of model dwellings; and the various types of dwelling and inhabitant are carefully described. Miss Octavia Hill, than whom there is no one whose opinion on the housing of the poor deserves more weight, strikes a warning note that is very much needed even by philanthropists. After speaking of the evils which come when "even a small number of the undisciplined are admitted to blocks," she declares that

> regulations are of *no* avail, no public inspection can possibly for more than an hour or two secure order, no resident superintendent has at once conscience, nerve and devotion, single-handed to stem the violence, the dirt, the noise and the quarrels; no body of public opinion on the part of the tenants themselves asserts itself, one by one disheartened the tidier ones depart, the rampant remain and prevail, and *often with a very fair show to the outsider* the block becomes a sort of pandemonium. [Page 265.]

And then she adds:

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Hence the enormous importance of keeping a large number of small houses, wherever it be possible, for the better training of the rowdy and the protection of the quiet and gentle; and I would implore well-meaning landlords to pause before they clear away small houses and erect blocks, with any idea of benefiting the poorer class of people. The change may be inevitable; it may have to come; but as they value the life of our poorer fellow-citizens, let them pause before they throw them into a corporate life for which they are not ready, and which will, so far as I can see, not train them to be ready for it. [Page 266.]

Another chapter is an account of the West End tailoring trade, "written by one whose daily life it is." Every one who reads it will echo the editor's wish that he could lay before us as vivid and true a description of the internal working of every industry in London. In Mr. Booth's own comments there occurs a sentence that sounds oddly from his lips:

Both in tailoring and bootmaking, the best "bespoke" work, which is the kernel of the West End trade, has a limited and perhaps a rather shrinking sphere, but the supply of first-rate workmen is as limited as the trade; and *to make themselves into a close corporation*, pushing all who are not capable workmen and good unionists into other branches of their trade, *would seem the most hopeful plan*.

This was, of course, the spirit of the mediæval craft guilds, which it has been the custom, until of late, to condemn for their monopolist character.

This and the account of Covent Garden Market which follows are the only chapters devoted to particular industries; and the slightness with which the industrial side of the problem is treated renders the volume of less comprehensive interest than its predecessor; but Mr. Booth assures us that he hopes to deal with it later "in another and more complete way" (page 3); and we can be content to wait.

The two chapters that follow, on "Common Lodging Houses," by Mr. Valpy, and on "Homeless Men," by Miss Tillard and the editor, are of peculiar moment in view of such statements as those which have recently been given to the public in *Darkest England*, as well as by Mr. Hyndman and other agitators. On some 250 residents in "common lodging houses" who applied for assistance, the judgment is pronounced that there were

only a very small minority of cases where slackness of work in the particular trade followed could be justly reckoned as the cause [of distress]. Indeed, very few even alleged slackness or want of work as a cause of their distress until this became the question of the day in connection with the Trafalgar Square disturbance. [Page 346.]

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And in the chapter on "Homeless Men" it is pointed out that "the supply of free shelters in the refuges and casual wards invariably exceeds the demand." "None of the refuges are often full; the largest has not been full for many years" (page 360).

After a description of South and Outlying London, in which the amorphous and deadly-dull character of South London, and the mushroom growth of new northern suburbs are emphasized, comes Mr. Llewellyn Smith's continuation of his article in the previous volume on "Migration." Next to Mr. Booth's own percentages of "poverty," Mr. Smith's conclusions as to the extent and character of the immigration to London from the rural districts have attracted most attention and have been most freely quoted. This is due largely to the fact that his conclusions are far more cheerful than the pictures which had previously been held up to us; and in reaction from the disagreeable phantom of the countryman who is unable to find work and goes to swell the number of the unemployed, it is a positive relief to dwell upon the idea of his honesty and brawn pushing to one side the feeble and untrustworthy Londoner.

> So far from finding their position in London hopeless, they usually get the pick of its posts, recruiting especially outdoor trades which have some affinity with those to which they have been accustomed in the country, and in general all employments requiring special steadiness and imposing special responsibility. The country immigrants do not to any considerable extent directly recruit the town unemployed. [Page 446.]

This is a distinct addition to common knowledge, and it has an obvious bearing on many questions of the day. Mr. Smith may be congratulated on the way in which he has prosecuted his inquiry; and it is the more easy to congratulate him because in this volume he has removed some of the slight defects which in the opinion of the present writer marred the presentation of his case in its earlier form. Instead of implying as he did then that the efflux from London almost balances the influx, Mr. Smith notices that even numerically the outflow is only half the inflow (page 444); and what is still more to the point, that of this outflow more than half is to the home counties immediately contiguous to the metropolis. "Much, therefore, of this movement cannot be classified as economic migration at all, if by 'migration' we mean a movement of residence which involves a *movement of work*" (page 450). Perhaps in some future treatise Mr. Llewellyn Smith will see his way to the use of a periphrasis occasionally instead of the word "law." That term has been so overworked by economists that it is entitled to a rest.

The last part is devoted to "Education," and especially to elementary education. No one who has lived near a poor London district and

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knows anything of the daily working of the school machine will disagree with Miss Tabor in her admirably clear presentation of the merits and defects of the present system. She sums it all up when she says: "Practically in London two codes are needed." But the chief lesson from the London elementary-school history of the last twenty years is one of hope. So vast a work has been already done! And if much remains, still the way has lately been opened to the necessary reforms.

No words of a reviewer are sufficient to praise adequately the two volumes which have so far resulted from Mr. Booth's investigation. Even the strongest believer in state action cannot but applaud this work of individual enterprise, which surpasses in accuracy and completeness almost all the work of government statistical bureaus, and yet is throughout marked by the most complete self-suppression. It is the positive duty of all those who are in charge of economic libraries to place these volumes on their shelves; and of every newspaper man or preacher who has based articles or sermons on the sensational work of the one Booth to give — not to impose too hard a task — half an hour's attention to the scientific work of the other.

W. J. ASHLEY.

Notions Fondamentales d'Économie Politique et Programme Économique. Par M. G. DE MOLINARI, Correspondant de l'Institut, Rédacteur en Chef du *Journal des Économistes*. Paris, Guillaumin et Cie., 1891. — 8vo, 458 pp.

This work confines itself within the strictest of orthodox limits and yet makes progress. It contains, as its title implies, a positive plan of reform, based on natural law and in harmony with the author's view of the evolution of society. In the introduction there is a compact restatement of natural economic laws as presented in an earlier work of the author. In this is traced the operation of competition in securing the survival of superior races and of superior social institutions. Then follow a general statement of economic principles, an account of the genesis of capitalistic industry, and a separate and extended treatment of the processes of production, distribution and consumption. A valuable part of the work presents in nine chapters the elements of economic progress and the obstacles that it encounters. This part prepares the way for the third division of the book, that, namely, which contains the "economic programme," or plan of reform, in which for practical readers interest will chiefly centre.

This concluding part gives an answer to the question with which socialists sometimes disconcert their critics: "What do you propose to do?" A scientific system that recognizes serious evils, rejects the

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remedies that are proposed and offers none of it own, is at a serious disadvantage. M. de Molinari does not content himself with negative work. He first reveals the weakness of socialism, and then offers, as chief elements of a positive programme of reform, free trade, security against war, the simplification of the state, the unification of markets, measures for securing on a grand scale the mobility of labor and a perfected self-government. This is avowedly a *laissez-faire* programme. In its entirety it will appeal to a considerable circle of readers, as embracing about all the positive changes for which it is worth while to contend. Parts of the programme will win a much wider assent. The sixth chapter of the third part of the work offers a valuable study of the limits of economic reform. It gives philosophical reasons for the instinctive rejection by every sound mind of schemes that promise too much.

J. B. CLARK.

Principles of Political Economy. By ARTHUR LATHAM PERRY, LL.D. New York, Charles Scribner's Sons, 1891. — xii, 585 pp.

The works of Professor Perry have been so long known in this country that any extended comment upon a new economic book by him is unnecessary. Not a few of us owe to him the beginning of our interest in political economy; but I fear, too, that to him is due not a little of the contempt that many sensible men have for the political economy of the schools, as it has been learned in this country. For Professor Perry's books have been very widely used, and his method of argument is very attractive to the novice.

This last book has the excellent qualities of his earlier works. There is the same easy, pleasant, rather verbose style, the vigorous epithet, the atmosphere of conclusiveness that leads the young reader to feel a sense of mastery which gives him a very desirable inclination toward the study of economic problems. The student is assured that

> any just generalization, made and fortified inductively, is put thereby beyond hazard of essential change for all time; for this best of reasons, that God has constructed the world and men on everlasting lines of order.

How stimulating is this sentiment when the making of such "just generalizations" is shown to be but an easy task! No wonder that Professor Perry's works have been popular as text-books, if he has succeeded in making teachers and pupils believe that there is only

> one unavoidable difficulty that lies at the very threshold of political economy [which must be] overmastered, and one walks thereafter with ease and pleasure throughout the economic domain.

All will agree that a student should have at least one hard task.

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But in this style and method is after all the weakness of the book, and of all books of that type. A clear conception of value is of course necessary for an economist; but even Professor Perry's conception of value does not enable men of affairs or men of thought easily to settle all economic problems. The premises are too complex and too variable for that; and any attempt to settle them by "rule of thumb" only entails endless confusion. The author, for example, in one of his numerous attacks upon our tariff system — which possibly deserves not a little of the vituperation — quotes Robert Stephenson's familiar generalization: "Where combination is possible, competition is impossible," and then ascribes to our protective tariff the combinations among coal operators and the "new kind of combination, called 'Trusts'" that "has come into almost universal vogue among these monopolists" (page 129). This is an off-hand solution of a great economic problem, but it is a solution that involves a serious mistake, as every one knows who has studied the facts.

However great the immediate satisfaction may be, I can but consider it a misfortune, from the pedagogical point of view, that from a few weeks' study of a text-book in any science, students should get the impression that they are masters of that science. A student's mind should be left in a questioning attitude; but books that enable students by mastery of some one difficulty to "walk with ease and pleasure" throughout any scientific "domain," are apt to encourage unscientific dogmatism.

I do not mean to say that the only value of this book is in its interesting style. All Professor Perry's works contain suggestive thoughts for one who has studied in this field. One who does not agree with him that the word "wealth" should be banished from economic discussion, may still be much benefited by his discussion of value. His view of the nature of rent is not accepted by most economists; but few text-books give so helpful a discussion of the machinery of the banks and foreign exchange. His books are filled with apt illustrations and striking statements of facts, though comparatively few will agree with him in such doctrine as the following:

> The motive on the part of both parties to each and every sale can be no other than the mutual satisfaction derivable to both; the inference, accordingly, is easy and invincible, that governmental restrictions on sales, or prohibitions of them, must lessen the satisfactions and retard the progress of mankind.

There are many excellencies in the book, but the mental attitude that it encourages is not one that students should acquire.

JEREMIAH W. JENKS.

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Threadneedle Street, a Reply to *Lombard Street* (by the late Mr. Walter Bagehot); and an alternative proposal to the one-pound note scheme sketched by Mr. Goschen at Leeds. By ARTHUR STANLEY COBB. London, Effingham Wilson & Co., 1891.

The immediate provocation of Mr. Cobb's treatise was Mr. Goschen's speech at Leeds, on the 28th of January, 1891, in which the latter presented certain views on the subject of the banking reserve of the United Kingdom. The immediate provocation of Mr. Goschen's speech was the Baring crisis of the preceding November, of which he said: "The liabilities were so gigantic, the position of the house was so unique, that interests were at stake far beyond individual fortunes, far beyond the fortunes of any class." If the Barings had been allowed to go to protest, British credit would have been so shaken that in his opinion no limit could have been put to the ensuing bankruptcy and distress.

This crisis led prudent men to ask again: What is the cash reserve that may be depended on in an emergency like the one that was so narrowly weathered? In the first place, what are the banking liabilities? They are all the deposits in all sorts of banks — private, joint-stock and the Bank of England. They amounted in July, 1890, to £643,000,000, of which £33,000,000 were Bank of England deposits and £610,000,000 those of other institutions. Deduct ten per cent as being twice counted, *i.e.* as deposited in one bank and by it deposited in another bank, and the remainder is £579,000,000 of net banking liability. And what is the reserve against this liability? The Bank of England keeps forty per cent of its liabilities to depositors in reserve, say £13,000,000. This was its average in 1889. The other banks keep about ten per cent "in cash or at the Bank of England." The amount kept by them in cash in their own vaults is little more than the till-money necessary to pay over the counter in one day's operations. The amount kept by them at the Bank of England cannot serve as a reserve for the country, unless that institution puts the money in a box and keeps it there. But the Bank of England does nothing of the kind. It could not make a living that way. It lends its deposits just as other banks do, but it does keep a much larger proportion of reserve than the others, *viz.* forty per cent as against their ten per cent. Practically the Bank of England's reserve is the total reserve in case of a panic in which securities could not be readily sold. It is a reserve of about £13,000,000 against liabilities of almost £600,000,000, or two and two-tenths per cent. This Mr. Goschen held to be much too small, but his plans for making it larger were rather vague and none of them has as yet been carried into effect.

Mr. Cobb first clears the ground of certain loosely held opinions touching the supposed duty of the Bank of England to keep a reserve

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adequate to the needs of the United Kingdom. The reasons assigned by certain publicists and financiers why this responsibility should be devolved upon one institution among many are: first, because the bank's notes are legal tender; second, because the bank has the government's deposits; third (this is Mr. Bagehot's reason), because the public depend upon it. The first and second reasons were shown by Mr. Bagehot to be no reasons at all. The bank's notes are not legal tender at its own counter. The government's deposits are no more helpful to the bank than private deposits of the same amount, and they were never taken under a contract to save the commercial community in time of panic. But is his own reason any better than those which he so easily brushes aside? Space does not permit us to go into the details of his argument and of the counter-argument of Mr. Cobb. We think, however, that the latter has succeeded in showing that Mr. Bagehot's usual precision of thought was here wanting — in other words, that he failed to show logically that any such obligation rests upon the bank as that of seeing that England remains solvent; for that is his way of putting it in *Lombard Street*. "On the wisdom of the directors of that one joint-stock company," he says, "it depends whether England shall be solvent or insolvent" (page 35).

What is here meant by "England"? Not the English government, surely. Does he mean the whole body of English banking and mercantile houses other than the Bank of England? Probably not, since a certain proportion of these would maintain their own solvency under all circumstances, as they did in the panic of 1866. Then he must mean all the weaker or more venturesome establishments, whether bankers or merchants. So the proposition quoted above should read in this way: "On the wisdom of the directors of that one joint-stock company it depends whether the more indiscreet bankers and traders of Great Britain shall be solvent or insolvent." Then inevitably the question arises: How indiscreet must a trader (the house of Baring for instance) be, in order to have a claim on the Bank of England in a crisis which he has helped to bring about? How much of his own assets must he have rendered unavailable in order that he may rightly "depend" on the bank to get him out of his own difficulty? Unless such questions can be answered, there is no peculiar responsibility resting upon the Bank of England in times of crisis. Custom and prescription have made the bank the keeper of the reserves of the other banks. It must be able to produce those reserves in times of crisis as well as at other times. In other words it must at all times meet its own demand liabilities. Nothing beyond this can be rightfully asked of it, although it habitually does a good deal more than this in every pinch.

Mr. Goschen spoke at Leeds of a second banking reserve to be

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obtained by an issue of one-pound notes, but he did not indicate how the reserve so obtained should be treated. By speaking of it as a banking reserve, his words implied that it would rest in the banking department of the institution. But under existing law there is no way to get any gold that is derived from note issues, out of the issue department into the banking department. The issue department is an automaton. When it puts out a note it takes in a sovereign and it holds this mechanically till the note comes back. Crisis and balance of trade have no more effect upon the issue department than upon one of Madame Tussaud's images. They may change the amount of gold and the amount of notes, but the proportion of one to the other, never. Mr. Cobb shows that when Mr. Goschen was talking about the second banking reserve and the issue of one-pound notes he had momentarily forgotten this distinction between the two departments which, although under the same management, are as separate as though one of them were a private institution in Threadneedle Street and the other a branch of government at Somerset House. Mr. Goschen in his later speech, December 2, 1891, presented a different scheme and a much better one. In fact his Leeds scheme was unintelligible. He acknowledged in substance that when he propounded it he had no definite plan.

Mr. Cobb's criticism on the Leeds speech has a certain amount of value, although the speech has been superseded and a definite plan has since been brought forward. Mr. Goschen's later plan contemplates an issue of one-pound notes in order to augment the stock of gold at the commercial centre, and then a certain liberty of over-issue of notes in time of crisis, on condition of paying the government a high rate of interest on such over-issue. This is the German system, the charter of the Imperial Bank containing a similar provision. Mr. Cobb's criticism runs this way: Whatever steps you take to put upon the bank or the government, or both, new responsibility for the solvency of the other banks, you offer the latter a temptation and an excuse for diminishing their own reserves, or as Mr. Goschen puts it, for "trading up to the hilt" and thus bringing on a crisis. There is much force in this argument, but it may be offset by facts. Has the like provision in the charter of the Imperial Bank had this deleterious effect in Germany? If so the plan is condemned. If not (and I think that no such effect can be shown), then are Englishmen so much more venturesome than Germans that what is safe for the latter is unsafe for the former? This question cannot be answered *ex cathedrâ*.

Mr. Cobb's alternative plan for forming and managing a second banking reserve is that each bank which receives commercial deposits (not savings banks) be required to set aside two and one-half per cent of such deposits and put the same in the Bank of England as a special

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deposit, the whole fund so brought together, say £16,500,000, to be treated as something entirely different from the ordinary funds, and not to be used or lent except in time of crisis. The test of the existence of a crisis is to be found in the rate of interest that people who can furnish good security are willing to pay. The money in this second reserve may be lent at ten per cent interest to anybody who will furnish stock-exchange securities of the kind allowed in the Trust Investment Act of 1889, with a margin of fifteen per cent.

This plan has the advantage of putting upon the banks themselves the burden of maintaining an adequate reserve against their own liabilities. Mr. Cobb thinks that this two and one-half per cent, added to the two and two-tenths per cent of reserve now existing, would be adequate. They would bring together about £30,000,000. Would the existence of a second reserve lead the banks to draw down the first reserve? This question cannot be answered in advance of actual experiment, but it is pretty certain that any plan which requires the banks to lay aside more of their money than they are accustomed to will meet with resistance from them, and will be circumvented if such a thing is possible. Mr. Goschen's final plan, proclaimed since Mr. Cobb's book was printed, avoids this difficulty.

Mr. Cobb's treatise evinces thorough familiarity with the subject he discusses, and his style is excellent. We note on page 147 a statement of some importance that is controverted by an earlier work on the same general subject. Mr. Cobb says:

> After the suspensions of the [Bank] Act in 1847 and 1866 the demands for ready money immediately ceased, and no extra issue of notes was required; and the only time the legal limit was exceeded — in 1857 — the amount was only about £447,000. The knowledge that money could be obtained at a price was sufficient to stop the demand for it.

Mr. R. H. Patterson, in his *Science of Finance* (pages 237–239), says that the panic continued after the suspension of the Bank Act in 1866, and that the Bank of London, the Consolidated Bank and Agra and Masterman's Bank closed their doors after that event. He ascribes these disasters to the refusal of the Bank of England to avail itself of the power to issue extra notes.

On page 113 Mr. Cobb tells us that "there is nothing to prevent the issue department of the Bank of England now issuing one-pound notes (for the act says nothing at all as to the denomination of the notes to be issued)." Here again an earlier work appears to contradict Mr. Cobb. Grant, in his *Law of Bankers and Banking Companies* (page 338), says that bank notes payable to bearer on demand for twenty shillings or above that sum, and less than five pounds, were prohibited

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to be issued or reissued by the Bank of England or any banker in England, after the 5th day of April, 1829. The act referred to is 7 Geo. IV, c. 6. Moreover Mr. Goschen's letter of December 3, 1891, says: "I propose to *authorize* the Bank of England to issue one-pound notes on the condition," *etc.*

HORACE WHITE.

The Financier and the Finances of the American Revolution. By WILLIAM GRAHAM SUMNER. New York, Dodd, Mead & Co., 1891. — Two volumes, viii, 309; v, 330 pp.

In writing history two qualities are essential: accuracy of perception and the ability to co-ordinate facts. Industry in obtaining matter goes for little if not accompanied by these preliminary endowments. Professor Sumner has been remarkably patient in his reading, and has omitted but very few of the ordinary authorities on Revolutionary history; he has consulted the original sources, and has even carried his researches into manuscript collections. It is hard to say too much for such work, as laborious as it is minute, and often so unsatisfactory through the imperfections of the record.

No one will deny that an account of Robert Morris was needed; or that the history of Revolutionary finance was unwritten. The field had been scratched by Bolles, but quite superficially, and that compiler had failed as utterly in the arrangement as he had lamentably in the selection of his material. Professor Sumner's selection of facts is excellent; he could not but be an exponent of sound financial views; and his criticism on the fiscal policy of the war is admirable. But much of the value of his work will be lost to the ordinary reader because of the bad arrangement of the material. In this respect alone does his book suggest that of Bolles.

The author began with the idea of writing a biography of Robert Morris; but finding so much of interest, he expanded the work to include a history of the finances of the Revolution, with Morris as the central figure. This was natural; for the position and actions of Morris could not be comprehended without some knowledge of what had made his appointment a necessity. It is in this preliminary portion that Professor Sumner has failed to produce the effect intended. It is impossible to isolate the events of the time into classes, under such heads as "Taxation," "Impressments," "Commerce." Paper money, tender laws and requisitions were all parts of one system; and from the levy and collection of taxes in colonial days, through the dark distress of the Revolution, up to the framing of the constitution, there is a connected and strictly logical story of the adoption of one recourse after another, their rejection or failure, and finally after much experi-

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ence, a federal system of adequate power. What was thought of taxation in 1781, had no connection with tax views uttered in 1779. The conventions on prices were as closely connected with commerce as they were with paper issues; state finance was entirely different from the so-called financial system of Congress; while impressments, requisitions in kind and embargoes were often of military rather than fiscal necessity. In making a chapter include all experiences on taxation, on embargoes or on foreign supplies, the sense of perspective is lost. The act of March, 1780, was the culmination of the paper issues of Congress, — a declaration of national bankruptcy, producing at home, and even in France, social effects whose influence can hardly be measured. Yet this important act receives scarcely more than a bare mention, and is not connected with the causes that drove Congress to its adoption. Here Professor Sumner has fallen into the same method as Bolles, and one hardly gains a clearer idea of Continental finance from the one work than from the other. Professor Sumner's passing criticisms, however, raise his work far above that of the earlier writer.

When the period of Morris's administration is reached the sense of disappointment in the critical reader is lessened. Here fulness of detail goes far to overcome defective arrangement. The natural son of an English merchant, Morris inherited a business habit of thought which was exceptional even at a time when most of the members of Congress were merchants, and possibly smugglers. His straightforward and cool-headed way of looking at things and his extensive mercantile connections and potential credit made him a power. The economic soundness of his views, and the fact that with a sense of responsibility he united a capacity for daring risks in speculative ventures, gained him the confidence of his colleagues; so that when the crisis came, all eyes were turned to him, and there was hardly a dissenting voice to his election as "Financier," despite the current charges that he was using his public position for private profit. The choice made by Congress was fruitful of results. Morris abandoned the financial operations of the past, but appealed to the interests of the states by insisting that commissioners should determine their indebtedness and so pave the way for a settlement. His word was worth more than the word of Congress; and in open market his paper was quoted at a higher rate than that of the government. While he did not make any great sacrifices for the cause, his mere presence and methods introduced an element of strength into important branches of the service which were almost dead from inanition. Professor Sumner considers that Morris's greatest public service was his issue of personal notes to pay the army and so allow it to disband; and it was only Morris's personal integrity that made that act possible. Order and economy remedied defects that arose from a

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lack of money; but they could not bridge over the enormous chasm left by financial mismanagement. Morris was at once a great success and a great failure; and it is well to have his success so fully and sympathetically described as it is by Professor Sumner. To accomplish all that he hoped for, required a revolution in the polity of the states, effected, however, in a time of peace, and when the evil results of fiscal dishonesty and financial juggling had been fully experienced.

The public career of Morris exercised a strange influence on his private life. It is doubtful if he ever really possessed a large fortune even for that day; and what ready capital he had was ventured in undertakings dependent for success on the chances of war, or other speculation quite as uncertain. Professor Sumner has collected a mass of evidence upon these points, and he is driven to the conclusion that Morris had become "mad with speculation and ambition." He had been flattered for years by the general opinion that he was the one man in America who understood the mysteries of finance — the one man capable of bringing order out of the general chaos.

> His habit of dealing with large sums on paper when he was public Financier, the glory of giving credit to the United States by his personal endorsement, the discovery that he could with facility circulate his personal notes as currency, and the prestige which he had enjoyed, were enough to turn the head of any man. They led him to that saddest of all human delusions, to which the most able and most fortunate are always most exposed, namely, that although other men are fools, one's self is wise.

From one speculation into another he quickly passed, until he had exhausted his credit, and the day of settlement came. A bankrupt, he was thrown into prison; and the man who once ranked with Washington, — whose unsupported name carried confidence in the leading markets of the world, — came from the debtor's jail with nothing more than the clothes he wore. In the summer of 1802 he went to Gouverneur Morris, "lean, low-spirited, and as poor as a commission of bankruptcy can make a man whose effects will, it is said, not pay a shilling in the pound." Four years later he died without having retrieved his fortunes.

It is when dealing with Morris that Professor Sumner shows the excellence of his method. He rarely departs from the original record, and as the pioneer in this field of research, he has well-prepared it for others. There is so much of political and economic wisdom in these pages, that no excuse will remain for wilful misinterpretation of the policy pursued during the Revolution. The work will take a high rank, because it is a biography and very much more.

WORTHINGTON CHAUNCEY FORD.

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Development of the Transportation Systems in the United States. By J. L. RINGWALT, Editor of the *Railway World.* Philadelphia, Railway World Office, 1888. — Fol., 398 pp.

The Railway Problem. With many Illustrative Diagrams. By A. B. STICKNEY. St. Paul, D. D. Merrill Co., 1891. — 8vo, 249 pp.

The Corporation Problem. By WILLIAM N. COOK. New York, G. P. Putnam's Sons, 1891. — 8vo, 262 pp.

The Railways and the Traders. A Sketch of the Railway Rates Question in Theory and Practice. By N. M. ACWORTH. London, Murray, 1891. — 8vo, 378 pp.

Transports et Tarifs. Précis du Régime, Lois Économiques de la Détermination des Prix de Transport, Tarifs de Chemins de Fer, *etc.* Par G. COLSON, Ingénieur des Ponts et Chaussées. Paris, Rothschild, 1890. — 8vo, 479 pp.

Theorie der Tarifbildung der Eisenbahnen. Von W. LAUNHARDT, Professor an der Technischen Hochschule zu Hannover. Berlin, Julius Springer, 1890. — 8vo, 84 pp.

Since the last review of railway literature in the POLITICAL SCIENCE QUARTERLY for March, 1890, a number of interesting books have appeared. A slight sketch of those most important for the student of railway economics may serve to throw some light on the questions still at issue.

Ringwalt's *Development of the Transportation Systems* is a huge encyclopædic work containing all sorts of ill-digested but often valuable information on nearly every topic of water and rail transportation. It does not pretend to be a scientific work, and many of its chapters are neither exhaustive nor logically arranged. Scarcely any references are given. But with all its shortcomings, the list of which might be greatly extended, it is a work of ready reference which contains a great many curious facts more or less difficult of access. It will considerably lighten the labor of the future historian of American commerce and industry.

The work of Mr. Stickney on *The Railway Problem* is remarkable for the fact that, although written by the president of an important American railway system, it forms the most serious indictment ever brought against American railway practice. It is the work of a man who cries *"Peccavi!"* but who has now become thoroughly frightened at the consequences of his own acts, and wants to be protected against his competitors. In other words, after describing the countless abuses of American railways so exhaustively that we cannot resist the con-

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viction that Mr. Stickney speaks out of the fulness of his knowledge as *particeps criminis*, he concludes that the only remedy is a fixing of rates through the national legislature or commission, with a temporary assumption of the line by a government officer whenever the law shall be infringed. The reader will search the book in vain for any acquaintance with theoretic literature, but he will find a mass of interesting facts. Mr. Stickney's temper may be inferred from the following quotations: "The truth is, it is not the 'Granger laws' nor the Interstate law nor the act of commissions which has reduced rates to the present unprofitable level, but the mismanagement of the companies" (page 86). "The 'Granger laws' have served the purpose of a 'bloody shirt' to conceal incompetence in railway management" (page 121). "Railway companies and stock exchanges, when illegitimately used, constitute the most perfect machinery for the purpose of legalizing robbery that the human intellect is capable of devising" (page 202). It may be seriously doubted whether Mr. Stickney's book will be of any aid in the practical solution of the railway problem; while it is certainly of no help in the question of theory. If its object is to increase the popular resentment against American railway management, the object will doubtless be effected. It is a remarkable work to come from an advocate of the railway interest.

In *The Corporation Problem* Mr. Cook has made an earnest attempt to grapple with a difficult subject. He lately published a work on the law of corporations, and now he attempts to discuss their economic phases. But Mr. Cook is not so good an economist as he is a lawyer. A really good economic work on corporations would have to deal fully with a great many questions which the author does not even mention. His treatment is confined mainly to railroads and trusts, and the work is in great part composed of quotations from other writers. His discussion of the railway problem is popular, and skims lightly over a great many important points; his treatment of taxation of railroads is very superficial, and his conclusion that the only remedy is concentration and consolidation cannot be said to be profound, when we recollect that some of the worst abuses in our American system are found in California, where there is practically a huge monopoly. Equally unsatisfactory is Mr. Cook's treatment of trusts. He does not attempt to give any economic analysis of their causes and results; he seems to imply that trusts are simply a passing phenomenon (page 236), and to share the belief that they are the creation of the protective tariff (page 240), and he does not seem to recognize the fact that we may prohibit, but cannot prevent, these huge combinations, whatever name or form they assume. The "corporation problem" is one to test the best energies of the ablest economists; an amateur economist, however well-meaning or

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however well trained in other departments of learning, is not apt to solve it successfully.

It is a matter of serious regret that Mr. Acworth's *Railways and the Traders* should have been written, as he himself states, on behalf of the English Railway Companies Association. This fact prejudices all readers from the outset; but needlessly, because the work is in many respects an admirable one, and because Mr. Acworth had reached his conclusions independently of any railway connection. Mr. Acworth has been much influenced by Professor Hadley's work, and his book is constructed on much the same lines and with much the same arguments. The portion relating to America brings nothing new, but the chapters devoted to England contain many interesting points. Mr. Acworth is justly a vigorous opponent of the doctrine of competition in rates — what he calls the American system; but it is significant that he upholds the doctrine of competition in facilities. We cannot have, says he, the advantages both of competition and monopoly; and he is an earnest advocate of the English competition in facilities as against the continental system of monopoly. It is perhaps doubtful whether Mr. Acworth does not overstate his case. It is very uncertain whether in this country the one kind of competition would not necessarily lead to the other. Mr. Acworth makes the usual mistake of ascribing undue importance to the report of the Italian commission in the eighties, when all experts know that the commission was packed, and that its conclusions were assured from the outset. And in treating of facilities, Mr. Acworth forgets that the fastest regular express train in the world was, until the recent introduction of the Empire State Express on the New York Central, the train from Hamburg to Berlin on the Prussian system of state railways. And although there is a certain element of truth in Mr. Acworth's contention that a railway company is only a shopkeeper on a large scale, who ought to be left alone, it is only half the truth; for the railway has a public function which the shopkeeper has not. While there is no doubt that Mr. Acworth seems to hold a brief for the railways, yet on the whole he makes good his contention against governmental fixing of rates and against bungling legislative interference. His book can be confidently recommended as, on the whole, the best presentation of the railway situation in England that has yet appeared. But it would have more influence if it were not such an unconditional plea for *laissez faire*.

In his *Transports et Tarifs* M. Colson sums up very judiciously the history and the economic laws of rail and water transportation. Many of his theoretical and mathematical investigations are based on the conclusions of Dupuit. His whole book may be said to be a lucid and thorough application of the principle of charging what the traffic will

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bear to all the ramifications of actual tariffs, which he often attempts to explain rather than to justify. Although intended primarily for Frenchmen, it will be of interest to all economists on account of his efforts to show that the theory of rates is simply a part of the greater whole.

Very much the same may be said of Launhardt's *Theorie der Tarifbildung*. In his recent work on mathematical economics Launhardt had much to say of the new theory of value and its application to transportation. In the present monograph he expands his discussion, and adds a formidable array of diagrams. He discusses the theory of rates from the public and from the private standpoint — the latter being that which conforms to the doctrine of maximum monopoly profits. His discussion of the various conditions under which a commodity may be transported is interesting, but would lead us too far astray. His conclusion is that the ideal tariff, according to the principle of greatest profits, is a system of high terminal charges, with a scale of gradually decreasing tolls for transport. This he thinks is the logical conclusion from the principle of value of service. He attempts to apply it to fares as well as to rates. While his conclusion is of doubtful value, his methods are exceedingly interesting.

The most important point for the student in all these works is the discussion of the principle of railroad rates. It is significant that all three of the works — Acworth, Colson and Launhardt — accept the doctrine of value of service, although at least one of them (Acworth, page 8) is acquainted with Professor Taussig's recent attempt to put forth the principle of joint cost as the explanation. And this is perhaps the most convenient place for saying a few words about Professor Taussig's theory.

The theory of joint cost, applied to railways, seems to me partly a truism, partly a fallacy. It is of course an undoubted fact that in all competitive enterprises the price charged is fixed in the long run by the cost of production of all the products taken together, and that what is lost in one by-product must be made good in another. No one, so far as I know, has ever denied this, and it has been put forth time and time again as an answer to those who claim that every particular railway charge should be fixed by the particular cost of service. If that is called the theory of joint cost, it is a truism. But the attempt to make this the chief explanation of railway rates is erroneous, for the reason to which Professor Taussig himself alludes in passing. Prices are fixed by cost of production, or by joint cost, only when the products are competitive products. There is always a marginal producer who fixes the price, and who sells without profit. But in monopolies there is no marginal producer; there is no necessary conformity of price to cost at all. Prices may be continually above cost, the difference being the

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monopoly profits. Price in such cases is fixed by the principle of monopoly maximum returns, which is nothing but charging what the consumer can afford to pay. The charges in each monopoly by-product will be put at the highest price consistent with greatest sales or profits, utterly irrespective of cost of production. Now a railroad is a monopoly; competition in charges is in the long run impossible. Railway charges therefore are not fixed by any principle of cost of production, but by the principle of monopoly profits, *i.e.* charging what the traffic will bear. The analogy to taxation, or the element of value of service, or ability to bear, comes in as in the case of all monopolies of necessaries of life. Taxation is compulsory, but payment for a monopoly of a necessity of life (like railroad charges in our present stage of civilization) is in one sense equally compulsory. The principle of charging what the consumer can pay (or what the traffic will bear) in any monopoly necessarily has reference to his ability to pay. The monopolist indeed does not care for justice or any ethical considerations, but the price that he charges is necessarily fixed by what the purchaser can afford to pay. Justice in taxation requires that a man shall pay in some proportion to what he can afford; the fixing of monopoly price depends on what he thinks he can afford. At bottom there is a real analogy between the cases. And this is the reason why at all times and in all countries government steps in to supervise in some way the fixing of monopoly price, when the monopoly product is a necessity of life.

Professor Taussig objects to the words "value of service" as an explanation of railway rates, and says that they cannot mean value in use, or intrinsic utility, because then grain and coal would be charged more than silks and spices. This is simply the old fallacy of saying that value cannot depend on utility, because water has far higher utility than diamonds. An acquaintance with the modern Jevonian or Austrian theory of value, as dependent on marginal utility, should have preserved Professor Taussig from this self-evident error. When we say that railway rates are fixed by value of service, we mean that the marginal utility of the service is definitely estimated by the public or the shipper; that if the rate exceeds this definite estimate the commodity will not be sent; and that a different estimate may be put on each different shipment or commodity. The value of the service, or the marginal utility of the service, fixes the price of all commodities; but it is only in the case of competitive production that this is equivalent to cost of production, or joint cost. Thus in reality Professor Taussig does not get to the bottom of the matter. Railway prices are simply a small part of the general law of value, as it has been most recently explained by economic theory. Marginal utility is the basic explana-

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tion; cost of production is a minor variation of marginal utility in the case of continuous, competitive production. Translated into railway language, railway charges are fixed in general by value of service; only in so far as there is competition will charges in the long run conform to general cost of production; but even here each individual charge must still be fixed by value of service.

Thus the theory of joint cost, in so far as it is true at all, is simply a subordinate explanation of a more general rule; and in so far as the railroad is a monopoly, the theory becomes less and less true. The entire dispute will easily be avoided as soon as it is once recognized that cost of service, or joint cost, is simply a variation of value of service; and that the theory of final utility (which is nothing but value of service) is the fundamental explanation of all price.

EDWIN R. A. SELIGMAN.

Il Socialismo Cattolico. Studi sul Socialismo Contemporaneo. Di FRANCESCO S. NITTI. Seconda Editione, Ampliata con l' Enciclica di Leone XIII sulla Questione Sociale. Torino-Roma, L. Roux e Co., 1891. — 8vo, 417 pp.

Several months ago Signor Nitti, a young university student, fairly startled the Italian public by a work written on a burning subject in a most pellucid and enthusiastic style. It was not many weeks before the first edition was exhausted and the present second edition published. Signor Nitti has set himself the task of studying all the phases of modern socialism in a purely objective way and with a fulness that has not yet been attempted. In the present volume he devotes himself exclusively to Catholic socialism, of which he has given us a remarkably interesting and extended account.

Signor Nitti is not a socialist, although he has many a sympathetic word to offer to the advocates of Catholic socialism. But he seems not to be a very profound economist, and his criticisms, of which there are not many, are sometimes lacking in acuteness and depth. He does not always seem to have grasped the fundamental point of modern industrial society or to have discovered the real weakness of socialism. He often mistakes sentimentalism for economics; he is content with the heart running away with the head. But if he is not a profound economist, he is an earnest Catholic. While he may be said to preserve a certain balance between socialism and liberty, he cannot be accused of undue partiality for any religious movement outside of Catholicism. Religion is to him Catholicism. The unconscious opposition to every other phase of religious thought tinges his whole exposition. The results are often one-sided.

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The few introductory chapters on the social struggles of Greece and Rome simply sum up what is well known. Not much more valuable is the chapter on the economic origin of Christianity. The pages devoted to the social contests in Judæa are not marked by any profound analysis or research. Had Signor Nitti been acquainted with the work of Kübel on the social legislation of the Old Testament, his exposition would have been more interesting. That the early Christians were communists and that the church gradually became more conservative, are likewise no especially new truths. But in the fourth chapter — the comparison between Catholicism and Protestantism from the social point of view — Signor Nitti begins to attract our attention. "It may be said," he declares, "without fear of exaggeration, that most of the great schisms and great contests which divided the Catholic church in the middle ages were nothing but economic struggles" (page 69). Catholicism, according to our author, was the mainstay of the weak and the protector of the oppressed. Protestantism represented the middle and the capitalist classes. "The Lutheran reform," he says (page 82), "was the triumph of middle-class individualism (La riforma luterana fu il trionfo dell' individualismo borghese)." "Luther himself had rather narrow ideas on economic and social questions." Protestantism has preserved the direction given to it by its founder, while Catholicism, in its origin communistic, has always been predisposed to look at the labor question in a light favorable to the laborer. That, according to Signor Nitti, is the keynote to the whole movement and shows why in Germany, for example, the Protestant clergy have held aloof, while the Catholic priests have taken a foremost part in recent social discussions.

Of course this way of regarding the situation brings our author into some perplexity when he comes to speak of England and the United States. And he is forced to confess that the Christian socialists in England did take an interest in the matter. As to America, his information about the social movement in the Protestant churches is very meagre. But Signor Nitti thinks that there is small likelihood of the Protestant and the Catholic clergy joining hands on this question in any country.

> The traditions of the Lutheran church are individualistic and conservative; the Catholic clergy have for centuries been accustomed to emphasize the limits of individual liberty, and are apt to resign themselves more easily to a conservative socialism.

This is partly true; but the student of economics will perhaps not agree with Signor Nitti that the Catholic church is to be put any higher on that account. The great trouble with our clergymen, whether Catholic or Protestant, is that they are often sentimentalists rather than econ-

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omists. And if the Catholic clergy were better economists, they would be less distinctively socialists.

So much for the groundwork of Signor Nitti's ideas. His history of Catholic socialism proper is full and valuable. He portrays to us successively Germany with Ketteler, Moufang, Hitze, Ratzinger, Winterer and Kopp, and the practical movements of Kolping and Schorlemer-Alst; Austria with Rudolf Meyer, Lichtenstein, Vogelsang, Weiss and Blome; Switzerland with Gaspard Descurtins and Mermillod; France with Mun, La-Tou-du-Pin Chambly and Fichaux; Belgium with François Huet and Dontcloux; Great Britain with Manning, Bagshawe and Devas; America with Gibbons and McGlynn; and in a final chapter we have a good account of the present position of the Holy See on the social question.

Much of what Signor Nitti says in the body of his work is new and interesting. Anti-Semitism in Austria he regards simply as a phase of socialism; he shows why socialism in Italy is anti-religious; and he maintains that in Spain socialism cannot become religious because of the depravity of the clergy. But throughout the rest of Europe Catholic socialism is a factor to be reckoned with, — a factor of increasing importance. Speaking of the Catholic socialists, he says:

> If they wish to reform society in the name of God, in a manner far different from the democratic socialists, they do not on that account desire any less radical or less profound a reform, nor do they on that account exercise on the laborers an attraction less dangerous or less intense.

With these words Signor Nitti closes his remarkable work, which will henceforth stand as the authoritative history of Catholic socialism. The style is so simple and unaffected that even those only slightly acquainted with Italian will find no difficulty in following the author's arguments.

E. R. A. S.

Notes on Land Tenure and Local Institutions in Old Japan. Edited from posthumous papers of Dr. D. B. SIMMONS by JOHN H. WIGMORE. Published by the Asiatic Society of Japan. Printed at the Hakabauscha, Ginza, Tokyo, 1890. — 8vo, 270 pp. with a map.

One gets up from the reading of these *Notes* with a quite uncanny feeling. We had known in a vague sort of way that there had been what was loosely called a "feudal system" in Japan; and M. de Laveleye and other writers had prepared us for finding something that could be brought under the equally vague designation of a "village community." But we were certainly not prepared to find that in most essential points mediæval society in Japan was the exact

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counterpart of that in Europe; that the development was apparently parallel not only in character but also in time; and that Japanese scholars are confronted by precisely the same historical problems as their Western *confrères*. It is as startling as if we came upon our "doubles."

Dr. Simmons, of whom a brief biographical sketch appears in the preface, was a distinguished American physician, who lived some twenty-five years in Japan and died in 1889. His profession gave him abundant opportunities for observing the daily life of the people, both before and after the "abolition of feudalism." Towards the end of his life he began to make manuscript collections of notes on social institutions, especially in the feudal period,—notes based on personal observation, on the information of his Japanese friends, and on two collections of provincial regulations and agricultural customs dating from the end of last century. The date and character of these works, it may be noticed in passing, at once remind the English student of the reports to the Board of Agriculture. But Dr. Simmons does not seem to have been in a position to give any very minute or scholarly attention to the mass of documentary material bearing on land tenure; and, with the exception of the writings of Sir Henry Maine, he appears to have been unacquainted with the European literature on the subject. Accordingly his notes, while of the utmost value as the first serious attempt to deal with the history of Japanese local institutions, and as stating the actual practice among the people in recent times, can hardly be regarded as conclusive. This is pointed out by the editor, Mr. Wigmore, who clearly combines with a wider mastery of Japanese "sources," a very adequate knowledge of modern English and German discussions on the history of European land tenure.

Mr. Wigmore has had a difficult task to perform. He has had to weave together a consecutive statement from disjointed scraps of manuscript; and he has had to combine a respect for his author with a readiness to point out in his annotations and appendices where Dr. Simmons is not up to modern lights. In both respects he has succeeded very well. For the vanity of the reviewer Mr. Wigmore is only too much alive to the resemblance between European and Japanese conditions; whenever the reader ventures to pencil on the margin the parallel English terms, he is sure to find on the next page that Mr. Wigmore has anticipated him. It is surely not too much to hope that before long Mr. Wigmore will pour forth to us out of the abundance of his knowledge, and this in some more substantial and independent form than the present.

The main points of resemblance between mediæval Japan and mediæval Europe may be briefly enumerated. There was the same dis-

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tinction between royal domain and the estates of the great nobles; the cultivated country was divided into *shōyen*, which may fairly be translated "manors"; the tenants upon these manors were in a condition of more or less servile dependence upon their lords; they cultivated scattered patches in open fields; they enjoyed the use of common meadows and forests; they were bound to perform labor services, which at a later period were commuted for payments in money or kind; there appeared among them social gradations which may be roughly compared to those of free tenants, villeins and cottars; and they were under the supervision of officers who were very much like the steward, bailiff and reeve. It has escaped Mr. Wigmore's all-searching eye that the dual position of the *nanushi*, and his obscure relations to the *toshiyori* (page 169; *cf.* page 109, note), reproduce precisely the difficulty which confronts the English student in the shifting use of the terms reeve and bailiff. Indeed, M. Fustel de Coulanges has pointed out a like difficulty in the case of the *villicus*, the *procurator* and the *actor* on Roman estates much earlier.

This, however, is but a small suggestion; a far more considerable matter, where Mr. Wigmore has for once missed his opportunity, is the *gonin-gumi* system. It is thus described by Dr. Simmons:

> The chief feature in the arrangement of the *mura* (or village) was this *gonin-gumi* system. Every five families were united in a *kumi* or company. [Mr. Wigmore adds in a note that "the *kumi* often consisted of six householders," and that in a certain territory "some *kumi* held more than ten householders"]. . . . One of the number was selected by themselves as headman or seal bearer. . . . He was also called *kumi-oya* (company-parent) or *ban-gashira* (watch-chief), and was required to be a land owner. . . . As a rule the *kumi* as a body was responsible for the defaults of its members, and even of their wives, children and servants. The carelessness or evil-doing of a single member meant full responsibility on the part of the other four also. If, however, any member persistently failed to conduct himself properly, he could be reported by his fellow-members to the *mura* officials. [Page 97.]

Mr. Wigmore discusses the theory of certain Japanese writers that this system had originally a military purpose and was borrowed from China or Corea, but only to reject the idea, and to observe that even at an early date the *kumi* "was regarded in the light of an administrative device for securing order and good conduct." But he does not notice that in its general features it was apparently very much the same thing as the English frankpledge. The frankpledge is an institution of whose practical working we are still waiting an explanation. Recent English constitutional historians seem to fight shy of it; perhaps they may find a clue by "surveying mankind from China" to Japan.

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The mass of the present population of Japan is, beyond all controversy, descended from the servile population of the middle ages. But the question of the origin of mediæval serfdom is in the same position in Japan as in Europe. Fortunately the pleasing vision of an original free village community has not made its appearance to divert scholars to a mistaken path: they realize that the task before historical science just now is to settle the relations between two phenomena, of the early existence of which there can be no manner of doubt, *viz.* the tribe and serfdom. Mr. Wigmore himself speaks with an uncertain sound, or rather speaks with two irreconcilable sounds. In one place (pages 157 *et seq.*) he speaks of the manorial system as "a later development of the ninth and tenth centuries," — influenced here probably by the German constitutionalists; and he tries to trace the fall of a supposed class of "smaller freemen," "the body of the people" (page 158), into subjection by means of processes like commendation. Elsewhere, however (page 132, note), he compliments Dr. Simmons for laying emphasis on the

two historical truths: (1) that the serfs of early times represented the conquered peoples (whether aborigines, strictly speaking, or only earlier immigrants); (2) that the mass of the common people of to-day represent the descendants of the early serfs.

The truth is that, as Mr. Wigmore recognizes, there are not yet sufficient data at command to justify an opinion; and until they have been brought together, European theories are rather a hindrance than a help. It is possible that the solution will be found in the direction suggested by Dr. Florenz's essay on *Altjapanische Culturzustände*, the substance of which is translated in the appendix. Dr. Florenz declares that the Japanese nation was originally made up of a number of "*uji* or clans, that is, patriarchal families including a number of persons related by blood," and adds: "These *uji* had in their corporate capacity their own landed possessions and *their own serf population*." If this is true, the question to consider is that of the relative numbers of the serf dependants and the fully free tribesmen, — a subject upon which some light may be thrown by the observation of races which are still, in our own day, in the tribal stage.

I have said that Japanese scholars are hardly troubling themselves with any free-village-community theory: it may be that the wave of anti-mark reaction has reached them before they were carried away by the mark current. But for European and American scholars who are still in doubt as to whether they should abandon the mark hypothesis, there is one of Mr. Wigmore's pages that ought to be of interest. One of the most suggestive results of recent inquiry is that many a practice which at first sight points clearly to an original com-

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munal ownership of land is shown to have resulted from the pressure of the government. Thus M. Kovalevsky, in his recent work on *Modern Customs and Ancient Laws of Russia*, assures us that the custom of periodical redivision of the lands of the *mir* is not a survival from ancient usage and a transitional stage from common to individual ownership, as Maine supposed, but the outcome of Peter the Great's measures of taxation. And now Mr. Wigmore calls attention to similar dangers of misconstruction in Japanese conditions, and points the moral for Europe.

> The facts of Japanese village life . . . show how many communal customs, apparently purely local in origin, were the result of superimposed laws. It is possible that the numerous instances of this sort may be suggestive and helpful in the examination of Western village communities. Take for example the cultivation of the land of a deserting farmer by his *kumi* or by the village. Nothing could at first sight point more clearly to a certain community of property, a corporate holding of land by the village. But on further examination this custom proves to have been commanded by the government with the object of preventing a diminution of revenue. Take, again, the necessity of obtaining the seal of the *nanushi* for all transfer of land, in mortgage or absolutely. This, we suspect at once, is analogous to the necessity of the consent of the kinsmen or villagers to the alienation of land noticeable in early communities. Yet in Japan a law of the Shōgunate required it; and even though we may yet discover that the Shōgunate merely sanctioned an existing custom (which is unlikely), we have nevertheless seen the necessity for caution, and for a thorough examination of all the apparently local customs having a communal character. [Page 171.]

W. J. ASHLEY.

Fugitive Slaves (1619–1865). By MARION GLEASON MCDOUGALL. Publications of the Society for the Collegiate Instruction of Women. Fay House Monographs, No. 3. Boston, Ginn & Company, 1891. — 8vo, viii, 150 pp.

This is a carefully prepared and valuable monograph which will be helpful not only to the special student of the history of slavery, but also to the general student of American history. Perhaps a glance at the "Contents" will give the best idea of the scope of the work.

Mrs. McDougall's general discussion of her subject occupies eighty-eight pages and is divided into six chapters. The first chapter is devoted to the colonial legislation affecting fugitive slaves, and is naturally without special interest or importance. I miss in this chapter any reference to a case which might well have furnished material for a foot-note — the case of the negro slave Billy, who fled from his master and committed such depredations that in 1701 the Virginia Burgesses

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were constrained to employ against him the direful fulminations of a bill of attainder (Hening, III, 210). Chapter II is concerned with the important national legislation from 1789 to 1850 inclusive. Chapter III gives a description of the principal cases arising under this legislation (1789–1860). Chapter IV is entitled "Fugitives and their Friends," and furnishes a plain and all too brief account of the methods employed to secure freedom to the slaves. Chapter V gives a concise sketch of the "Personal Liberty Laws" passed by the Northern states; and the author concludes that as the Fugitive Slave Law was held constitutional by the Supreme Court,

> any attempt to prevent its enforcement by positive means, however righteous from an ethical standpoint, must be considered an infraction of the constitution, and of the common understanding between the states, on which the Union was founded. The provisions denying the use of state institutions and officers, though distinctly unfriendly, were not unconstitutional.

In these conclusions she will be supported by most persons who have studied the subject. Chapter VI is entitled "The End of the Fugitive Slave Question" (1860–1865), and gives a good account of the attacks made upon slavery by Congress during the progress of the war.

Following the general discussion come five appendices which to the specialist form the most valuable part of the monograph, and which are an unmistakable evidence of Mrs. McDougall's thorough training for her work. These appendices contain lists of colonial laws relative to fugitives and of national acts and propositions relative to fugitive slaves from 1778 to 1864, together with a list of important fugitive slave cases and a bibliography of both cases and legislation. The index is serviceable and the proof-reading has been good. I note, however, that on page 131, either the printer or the author has made a slip in speaking of Judge Iredell's edition of *South* Carolina statutes.

In conclusion there is little to be said of this study except in the way of praise. It would seem, however, that the author might have made her general discussion more interesting by giving more fully the views of leading Southerners, like Davis and Stephens, on the fugitive slave question, and that she might have made her bibliography more complete by drawing more largely on Southern sources. She deserves great credit, however, for her self-restraint in allowing her facts to speak for themselves, and in not indulging in what I may venture to term historical hysterics. It is positively refreshing to read an author who can refer to that picturesque character, John Brown, without calling him either a "martyr" or an "incendiary."

W. P. TRENT.

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Oxford City Documents, Financial and Judicial, 1268–1665. Selected and edited by J. E. THOROLD ROGERS, M.A. Oxford, printed for the Oxford Historical Society, at the Clarendon Press, 1891. — 8vo, vii, 439 pp.

Collectanea [*of the Oxford Historical Society*]. Second Series. Edited by MONTAGU BURROWS, M. A. Oxford, the Clarendon Press, 1890. — 8vo, ix, 517 pp.

The subject-matter of Professor Rogers' book may be grouped under three general heads: taxation, including population (pages 1–141); judicial procedure (pages 143–241); and miscellaneous (pages 243–337). The first head is of special interest to economists. It includes the poll-tax rolls of 1380, the hearth tax of 1665, and a calendar of subsidies with some extracts from the subsidy rolls, 1313–1630 [1671]. The list of contributors to the poll tax of 1380 is an exhaustive catalogue of the burgesses and all other lay persons of Oxford outside the university. The total number thus taxed was 2035. Allowing for the children and adding about 1500 for the members of the university, we may infer that in 1380 the total population was about 5000. The tax was to yield on an average twelve pence for every individual. The highest assessment in these rolls is 13*s.* 4*d.*, and the lowest, 4*d.* The whole amount collected for the crown was £100 5*s.* Of the other records relating to taxation and population, the most important are the returns of the hearth tax of 1665, which are printed *in extenso*. Including the university, the number of hearths was 5134. The whole population of Oxford, academic and civic, at this date, was from 7000 to 7500.

All these documents throw much light upon the population and wealth of Oxford, and the financial relations of the city to the crown, from the fourteenth to the seventeenth century inclusive. The poll-tax returns of 1380 are particularly interesting because they show also the various occupations of the citizens, whose names are brought together in a useful index at the end of the volume under their respective crafts — apothecaries, bakers, bowyers, *etc.* The compiler of the index apparently did not know the meaning of certain archaic terms, such as "ferour," "corsor," "waller," for he does not explain all of them, and he has distinct headings (without cross-references) for such occupations as "ferour" and "smith," "waller" and "mason," *etc.* The population of Oxford in 1380 corresponds to that of many of the larger boroughs of England in the fourteenth century. Few English municipalities of this period had more than 5000 inhabitants, and most of them probably had less than 2000. But regarding this matter it is difficult to generalize, as the subject, like most phases of English municipal history, has not yet been adequately investigated. We hope that, be-

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fore many years elapse, some such monographs on English towns will be written as Jastrow's *Volkszahl Deutscher Städte zu Ende des Mittelalters*. There is abundant material in print, and especially in manuscript among English town muniments, illustrating this subject.

The most important documents in Professor Rogers' book are those that fall under the head of judicial procedure. They comprise coroners' inquests (1297–1322), criminal inquisitions held by other civic magistrates (1298–1520) and the proceedings of the itinerant justices at Oxford in 1285. Most of these records are taken from old transcripts made by Bryan Twyne, and they contain obvious errors which Professor Rogers left uncorrected. For example, we frequently find "*extra* et utlagatur" in connection with criminal cases. The correct reading is "exigatur [the guilty person is to be placed in exigent] et utlagetur." In the inquests and inquisitions the offenders are mainly students ("scholares" or "clerici"). It was not uncommon for them to go though the streets after the hour of curfew well armed ("cum gladiis et arcubus et sagittis citra horam ignitegii"), ready to brawl or to commit murder. Of the twenty-nine inquests, thirteen relate to murders perpetrated by students. Few extracts from such coroners' rolls of the thirteenth century have been printed, and yet many of these records exist in manuscript in the Public Record Office and in town archives (London, Leicester, Norwich, Wallingford and others). The coroner of that period had important functions, and a careful study of the history of the office before Bracton's time may add to our knowledge of other institutions, such as the origin of the petty jury in criminal cases. In dealing with the history of the coroner, the best text-books begin with a brief reference to the eyre of 1194, and then pass at once to Bracton and the statute of 4 Edward I. But the office existed, at least in boroughs, before 1194, and there is much material in print illustrating its history during the first quarter of the thirteenth century.

It is not necessary to describe the contents of the eyre rolls of 1285. Any one who has used Palgrave's *Rotuli Curiæ Regis* or Maitland's *Select Pleas of the Crown* and *Pleas of the Crown for the County of Gloucester*, knows how valuable such records are — what a flood of light they throw upon social life, institutions of government and legal ideas in the middle ages. Every new text of this sort that is printed materially assists students of history and political science.

Among the miscellaneous muniments in this volume, the most interesting are those illustrating the relations between town and gown, especially those concerning the great fray on St. Scholastica's day, February 10, 1355.

The introductions to the various documents do not reach the level of work in Professor Rogers' other books. In the light of recent in-

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vestigations, his remarks concerning the early history of itinerant justices (page 182) seem superficial; and his explanation of the origin of the office of coroner, on page 147, is very questionable. On page 146 he says that the coroner's jury at Oxford usually consisted of twenty men, but an examination of the inquests which he has edited shows that this was not the case. We must be charitable enough to suppose that he would have corrected some of these errors, had he lived to put the finishing touch to his work.

The other volume before us relating to Oxford, the *Collectanea*, is a valuable contribution to historical research, but only a portion of it will interest students of political science. It consists of seven distinct articles and an appendix. The first article is entitled "The Oxford Market," by Rev. Octavius Ogle. The documents which he prints are useful for the study of England's commercial history. Of his introductory remarks we cannot speak so favorably. His failure to find any mention of markets in England before the reign of Cnut (page 9) shows a lack of familiarity with such sources as Kemble's *Codex Diplomaticus* and Schmid's *Gesetze der Angelsachsen*. I think, moreover, that he might have gone to better authorities than Blackstone for certain of his historical facts (pages 10, 44). The next three papers, "The University of Oxford in the Twelfth Century" by Professor T. E. Holland, "The Friars Preachers *vs.* The University (1311–1313)" by Rev. H. Rashdall, and "Notes on the Jews in Oxford" by Mr. A. Neubauer, are all instructive and scholarly. Professor Holland's article elucidates the introduction of the study of Roman law into England, as well as the history of universities. His general conclusion, after careful investigation, is that the origin of the University of Oxford must beyond question be sought in the twelfth century, while in the opening years of the thirteenth century we find it already full grown. He prints *in extenso* all accessible contemporary evidence of the twelfth century bearing upon the subject, with critical comments. The extracts relating to the teaching of Vacarius at Oxford are especially noteworthy. Mr. Rashdall edits a long document describing the quarrel between the university and the friar preachers, which culminated in the year 1311 in an appeal to the court of Rome. His paper throws much light upon the constitutional development of the university and upon the history of the mendicant orders. Mr. Neubauer gives, in chronological order, references to documents in which the Jews of Oxford are mentioned. His introduction contains some interesting remarks concerning the relations of English Jews to secular learning. He thinks that their influence upon learning in England has been exaggerated. The other articles in this volume are "Lianacre's Catalogue of Grocyn's Books" by Professor Montagu Burrows, "Table-talk and Papers of Bishop Hough" by Rev. W. D.

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Macray, and "Extracts from the Gentleman's Magazine relating to Oxford, 1731–1800" by F. J. Haverfield.

The Oxford Historical Society is to be congratulated upon the continued success of its publications. We are glad to see that it has begun to turn its attention to the older civic records of Oxford. Research in the much-neglected field of English municipal history would be stimulated if similar societies were formed in other towns of England, for the purpose of printing some of the many important documents which now lie mouldering in the borough archives and in other local repositories.

CHARLES GROSS.

Canadian Studies in Comparative Politics. By JOHN GEORGE BOURINOT, C.M.G., LL.D., D.C.L., Clerk of the House of Commons of Canada. Montreal, Dawson Brothers, 1890. — Large 4to, 92 pp.

As the reader into whose hands comes this attractive quarto opens the broad pages and admires the wide margins, the first thing that strikes him is that his rights are disregarded by the total omission of an index. Here is a work which would make a respectable little octavo volume, without a guide to its text. The feeling of disappointment is enhanced on turning to the table of contents and finding but three chapter headings, all relating to Canadian institutions. The learned author has already written much on Canada. All students of the institutions of that country are of course familiar with his *Parliamentary Procedure*, his *Manual of Constitutional History*, his *Federal Government in Canada*, and his paper on "The United States and Canada"; and are looking forward with eagerness to his promised paper on "Parliamentary Government in Canada." In the work under review new facts and riper deductions are naturally expected. As one turns the leaves, however, there is somehow an impression of vague familiarity. Especially in the second paper, "Comparison between the Political Systems of Canada and the United States," there is a wafted fragrance of an article by Mr. Bourinot on "Canada and the United States" in the *Annals of the American Academy* for July, 1890. A careful comparison shows that practically the whole of the latter article, with many additions, is incorporated in the chapter under consideration. To such a practice there is no ethical objection, provided the transfer be indicated; but there is no preface or footnote to warn the student that the two are in effect the same. Certain printer's marks also suggest, what is nowhere stated, that the book is printed from the plates of the *Transactions of the Royal Society of Canada*, in which doubtless the essay, or rather lecture, has found a third place of deposit.

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The first of the three papers is on "The English Character of Canadian Institutions." The very title suggests a certain want of humor. What other institutions would be likely to be developed by Englishmen under the control of the English government? To be sure there is the French element; and one of the most valuable parts of the work is the discussion of the reasons why that race has so little affected the development of government in Canada. Except as to Parliamentary responsibility and the civil service, however, Mr. Bourinot's summary of English institutions reproduced in Canada (pages 21–25) might equally well be applied to the United States.

The second paper is in good part old straw, long since threshed out by Mr. Bourinot himself. It may be useful to Canadians who need information about the United States: it is certainly not suggestive to Americans. In his own subject — Canadian government — Mr. Bourinot is an expert, and commands the respect due to an expert, however dogmatic, and however unwilling to allow that there are other experts in Canada. In respect to the institutions of the United States he is rather an observer than a student. He accepts, apparently without hesitation (pages 50, 57), Sir Henry Maine's wrong-headed notion that the Convention of 1787 built up their system of government around the English system of that time. Every student of the proceedings of the convention may see that the members had in mind state and Congressional institutions and hardly thought of England. If Mr. Bourinot sat as clerk under the Speaker at Washington, instead of at Ottawa, he would not say that "the Speaker cannot directly initiate or control legislation." His authorities are excellent, so far as they go; still he shows little knowledge of the sources. Bryce, Cooley, von Holst, Lalor's Cyclopædia, are invaluable works, but a scientific comparison of the institutions of the two countries requires far wider reading and in literature of a different kind.

The third paper is on "Federal Government in Switzerland compared with that of Canada." Here Mr. Bourinot's lack of acquaintance with the country and the literature is very apparent. He devotes several pages to a restatement of constitutional provisions, and refers to some valuable articles in periodicals; but he does not mention Adams and Cunningham's excellent book, unless he means that work when he speaks of "Adams' Swiss Constitution"; he barely refers to Moses, just mentions Orelli and Bluntschli, and evidently has never seen Dubs. It is as if one should write on Canadian Federation without reading Bourinot's books. Mr. Bourinot is like the well-known gentleman who "knew Latin in Scotch, but not in English"; he knows federal government in Canada, but not in general.

ALBERT BUSHNELL HART.

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État Sommaire par Séries des Documents Conservés aux Archives Nationales. Paris, Librarie Charles Delagrave, 1891. — Large 4to, 518 pp.

This volume has been issued under the direction of M. Servois, who is general custodian of the national archives at Paris. It is, in spite of its bulk, a brief catalogue of the contents of the French national archives. Three attempts have hitherto been made to publish catalogues of this great collection. M. Daunou issued a brief *Tableau Systématique* in 1811. In 1867 the publication of a much more elaborate catalogue, called the *Inventaire Générale*, was begun, but it has not been completed. In 1871 M. Maury published the first part of a *Tableau Méthodique*, containing the lists of the documents relating to French history previous to 1789 arranged according to subjects. In 1885 it was resolved to reissue the *Inventaire Générale* with necessary additions and corrections. The work was intrusted to the archivists in immediate charge of the various series. The result is the volume before us, the authorized catalogue of the entire collection, to which is added an elaborate index to facilitate the work of the investigator. It is also announced that from time to time in the future, calendars will be published giving fuller descriptions of certain classes and groups of documents. In this way the archives will be made more accessible to scholars.

In this volume no attempt is made, as in the *Calendars of State Papers* issued by the officials of the Record Office in London, to give the contents of documents. Neither is each separate document, or even bundle of papers, mentioned. Instead, only the subject matter contained in groups larger or smaller is given. But the explanations, though brief, are so clear, and the classification in the main so natural, that the student can easily gain a correct general idea of the contents of the archives. The documents are arranged in seven sections — legislative, administrative, administrative and historical, historical, the domains, judicial, legislative and judicial. Under each of these sections appears one or more series. The contents of each series are arranged under various subordinate heads.

The formation of the national archives of France began during the first revolution. Since that time additions have been made from the offices of various departments of the central government and from other sources. Some documents have also been transferred from the archives to the National Library, where they are more accessible to students. What now are some of the most valuable features of this great national collection, as they appear in this catalogue?

The student of French history under the old monarchy will find in

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the *Trésor des Chartes* the records of the feudal rights and obligations existing between the kings and their great vassals throughout the country; the documents issued during the conflict between Philip IV and Boniface VIII and during the prosecution of the Templars; also a vast number of transcripts of cartularies and other important records. Under another series are the decrees of the French kings from the Merovingian period to 1789; the history of the royal family, its marriages, wills and *apanages;* the records of many sessions of the States General, of the provincial estates, of the parliaments; an important collection of documents concerning the history of Paris from the twelfth to the eighteenth century; the records of negotiations with foreign states, particularly with Spain. Among the materials for the ecclesiastical history of France is a collection of papal bulls and letters extending from the time of Charlemagne to the beginning of the Revolution; the archives of the archbishopric of Paris, of the chapter of Notre-Dame, of the parishes and collegiate churches connected with the diocese of the city; and a vast array of documents concerning the monastic orders and foundations in all parts of France. The student of French administration on its historic side will find here the records of the *Contrôle Générale des Finances* under the old régime, — the letters from intendants during the seventeenth and eighteenth centuries being particularly important. In order to complete his views of any period he will have to consult the records of the *Chambre des Comptes de Paris*, and the descriptions of the royal domains, giving their extent, the titles by which they were held, and the payments due from them. In another section of the archives will be found the records of the royal household and of all the great offices connected therewith. Under the head of local administration the student will find the documents relating to the history of the ancient *généralités*, the most important part of the collection being that in reference to Languedoc. Here also are the materials for the administrative history of Paris. A most attractive series to the historian is that containing the records of the confiscations and persecutions following the revocation of the Edict of Nantes. Under the *Section Judiciaire* are to be found the proceedings of the various royal councils and commissions while acting in a judicial capacity, of the parliament of Paris, of the Royal Chancery; also the records of the courts of special jurisdiction, as the *Cour des Aides*, the *Cour des Monnaies*, the admiralty court, *etc.* Finally, in this section are the records of the *Châtelet de Paris*, and of the office of Provost of the Île de France.

But the collection of materials in the national archives for the history of modern France is apparently more complete than that relating to the old monarchy. Here are the proceedings in full of the various legislative bodies which have existed in France since 1789; of the revolu-

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tionary tribunals created by the law of August 17, 1792, and by later acts; of the Committee of Public Safety and other councils organized for executive purposes by the conventions; of the agents and committees sent by the assemblies throughout France and into Belgium to extend the ideas and policy of the Revolution. In the archives also are pretty complete lists of the estates confiscated and the corporations suppressed during the Revolution. Under the series entitled *Administration Générale* are to be found the documents relating to the national administrative system in its modern form and in all its departments. There one could study at length the results brought about by the events of the revolutionary and Napoleonic era. Under the head of the *Collection Rondonneau* — named from an archivist of the last century — have been placed some of the most valuable documents in the national archives, relating to all periods of French history and to all departments of its administration.

Scholars the world over should welcome a liberal policy such as that which has led to the publication of this catalogue. It invites research among the sources of knowledge, at a place where are stored the records of a great nation's history. The hospitable spirit of which it bears evidence should attract students from this side of the Atlantic to the investigation, not simply of French colonial enterprise, but of French democracy and of the history of the nation in its remoter past.

HERBERT L. OSGOOD.

Das Oesterreichische Staatsrecht (*Verfassungs- und Verwaltungsrecht*). Ein Lehr- und Handbuch. Von DR. LUDWIG GUMPLOWICZ, Professor in Graz. Wien, Manz'sche Buchhandlung, 1891. — xiii, 655 pp.

That the form of government adopted by a state depends less on the application of any preconceived theory than on existing political and social conditions, is a widely recognized fact. A most striking illustration of this fact is to be found in the public law of that complex of states and nationalities which is commonly known under the rather deceptive title of the Austro-Hungarian Empire. The political conditions in this portion of Europe are very much what they were in England before the centralization of the Norman monarchy, or in France before the time of Louis XI. But the prospect of a similar result in unification and subjection to Teutonic rule is not bright. The monarch represents almost the only unifying force, and the methods which were once considered proper for him to use in consolidating the state are now regarded as inconsistent with individual and national rights. Constitutionalism came too soon into the world for the highest good of

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Austria-Hungary, if we consider that highest good conditional on the final development of a unified state, or even of a situation like that in Germany or the United States, where, while the state is unified, the government remains federal. Race prejudice and race pride have, as Professor Gumplowicz points out in the book before us, taken advantage of the constitutional system introduced about the middle of the present century not only to check any new efforts in the direction of centralization, but even to undo part of the work that had already been accomplished. This is seen even in the administrative system, where in more than one instance business is still distributed according to geographical lines rather than according to its nature. Even in the Cis-Leithan portion of the empire we find executive departments for particular sections, as *e.g.* a Galician department.

As a result of these peculiar political and social conditions we find a most peculiar public law, — a public law which only an Austrian can treat intelligently, and which affords practically no basis for comparison with the systems of more centralized states. Professor Gumplowicz, recognizing the impossibility of ticketing Austrian institutions with any of the ordinary labels of political science, falls back upon the celebrated answer to the question: What kind of a state is Austria? and replies: "Austria is Austria."

> The present political form of Austria-Hungary is the result of its peculiar historical development . . . a result which is at present formulated in the law of 1867. This may not be designated by any of the theoretical terms of political science; it can be comprehended and expressed only by the consideration of the compromise made in this law between the important political factors in Austria and Hungary.

After this position has been taken by the author, it is hopeless to expect from him any detailed consideration of the questions which vex the student of federal government, or any contribution to the solution of such questions. Professor Gumplowicz is of an eminently practical turn of mind — is little troubled by any desire to adopt or improve upon the existing categories of political science. His aim is to lay before the student, without any serious attempt at a scientific classification, the rules of law in force at present in the countries he treats. But on the other hand he gives quite fully the historical reasons of existing phenomena. As his book is devoted to administrative as well as to constitutional law, the student will find abundant information as to the relations of the various important governmental authorities and the protection offered to individual rights. The description of the local government system is comparatively complete, and a succinct statement is given of the law in respect to the police power, the army, the

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finances, diplomatic administration, census and passports, highways, railways and the like, agriculture, industry and labor, the public health, education and the care of the poor. The information in the work is made accessible by a good alphabetical index.

F. J. G.

The Swiss Republic. By BOYD WINCHESTER, late United States Minister at Bern. Philadelphia, J. B. Lippincott Company, 1891. — 8vo, 487 pp.

State and Federal Government in Switzerland. By JOHN MARTIN VINCENT, PH.D., Librarian and Instructor in Johns Hopkins University. Baltimore, Johns Hopkins Press, 1891. — 8vo, 247 pp.

Two new books on Swiss institutions, both of them meritorious, afford a gratifying indication of an increasing interest in the institutions of other countries. For his task Mr. Winchester has had the advantage of four years' residence at Bern as minister of the United States. This has given to his book a freshness which comes from knowledge acquired at first hand, and which makes up for certain defects in judgment and in style which are here and there noticeable. In his account of the Federal Assembly, of the republican simplicity that prevails at Bern, of the *landesgemeinde* of Appenzell, and largely throughout the book, the author draws upon his own observation. Facts gathered on the spot give vividness to his statements. To illustrate the practically life tenure of members of the Swiss legislative bodies, he tells us that death and voluntary retirement accounted for nineteen out of twenty-one changes at the last general election. Only two members of the Federal Council, we are told, have failed of re-election since 1848 "on the avowed ground of political divergence." The same preference for men of experience is seen in the custom by which the Vice-President always succeeds the President. "In this way every member of the Federal Council becomes in turn Vice-President and President during each septennial period."

In his chapter on citizenship the author's diplomatic experience comes to his aid in his account of the difficulties which a foreigner encounters who attempts to become a Swiss citizen. Communal citizenship, which is the basis of Swiss citizenship, is a matter of purchase; for it carries with it an interest in the communal property and an eventual right to be supported in case of need. The favorable action of the canton, which "considers the petition from a different and higher standpoint," is more difficult to obtain. Political rights the Swiss citizen may exercise wherever he is domiciled, but he has corporate and property rights only in his canton of origin. The chapters on

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"Military Service and Organization," "Education," "Technical and Industrial Schools" and "Industry and Commerce" also contain a good deal of information gleaned in the country itself.

Mr. Vincent knows his history better than does Mr. Winchester. His closing chapter on the "Literature of Swiss Constitutional History" will prove a useful guide to students. The introductory chapter on the "Origins of the Commonwealth" evinces historical insight. Unlike Mr. Winchester he will not accept Mr. Freeman's account of the *landesgemeinde* as the continuation of the old folk-mote, but regards it as an outgrowth of the feudal manorial court.

The author has made a painstaking use of the best authorities, and has given us in the compass of two hundred pages a clear account of Swiss institutions, both federal and cantonal. Among the chapters on "Federal Government," which form the first half of the book, that on "Federal Finance" may be singled out as a piece of thorough work. The latter half of the book deals with "State Government," and here we find, among other things, a suggestive account of the organization and powers of cantonal legislatures and executives. It is perhaps an open question whether more is gained or lost by such a division of the subject as that adopted by Dr. Vincent. The historical relation and actual connection between state and federal institutions is so close, that much may be said in favor of beginning with a discussion of the characteristics of Swiss political institutions and then tracing the relation of the Confederation and the cantons in the various fields of governmental activity. This method would have the advantage of fixing the attention on tendencies and principles, which otherwise are in danger of being lost to view amid a mass of details. The study of political forms is of interest, not in itself, but because of the light it throws upon the laws and conditions of national development. Dr. Vincent's principle of division seems to overlook the organic unity which belongs to a federal as well as to a simple state.

RICHARD HUDSON.

The Government of Victoria (Australia). By EDWARD JENKS, M.A., Professor and Dean of the Faculty of Law in the University of Melbourne. London, Macmillan & Co., 1891. — xiii, 403 pp.

It is encouraging to all who are interested in the study of public law to learn from the preface of Professor Jenks's book that a course of lectures on this subject is given in the University of Melbourne. By public law the author means not merely that body of constitutional principles which aims at the protection of private rights and which comes most frequently before the courts, but rather the whole law of

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government — the German *Staatsrecht.* Its content is so wide as to embrace not only the organization and relations of the three great branches of the general government, but also the organization of the local authorities and corporations and their relations with the central power; and its sources are to be found not alone in statute and judicial decision, but also in official correspondence, parliamentary resolutions and orders, and political tradition and practice. In other words, Professor Jenks's book is a compendium of the constitutional and administrative law of Victoria, and at the same time a historical sketch of its development. Indeed, the historical sketch constitutes half the work and to the foreign reader seems out of proportion. It serves a useful purpose, however, since Professor Jenks is a pioneer in the field. No such history of the political and administrative development of Victoria existed at the time he began at Melbourne the lectures which have resulted in the publication of this work. The work seems to be thoroughly done. Almost all important points are fortified by references to official documents and other original sources of information.

A striking result is reached when we compare the system of government which has been evolved by Australian Englishmen with that evolved by American Englishmen. While the latter have decentralized the old English system, the former have centralized and bureaucratized it. Perhaps this may be explained by the fact that while we formed our system on the basis of that in England during the seventeenth and eighteenth centuries, emphasizing its decentralized character by the almost universal introduction of local elections, the Australians based their system on that of England after the Poor Law Amendment Act of 1834, when the leaven of centralization and bureaucracy had begun to work. The strong bureaucratic tendency of the Victorian Public Service Act of 1890 cannot fail to be noticed by the most casual reader. The tenure of the civil officers is practically for life; they may be removed only after an investigation in which the accused may be represented by counsel; they may not be engaged in any other occupation; and yet, strange to say, they are not, since an act of 1881, entitled to receive any pension.

In those portions of the work not relating to Australian affairs, certain statements appear a little too broad, to say the least. Thus it is said that a crown official of however exalted a position may be made personally responsible for any illegal act committed by him against a fellow-subject. Such a responsibility does undoubtedly exist in some of the most aggravated cases of illegal action, but all the commentators (*e.g.* Todd and Broom) affirm on the authority of judicial decision that ministers are ordinarily exempted from suits for damages; and it is a well-known fact that it is practically impossible to sue a minister. Again, it

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is said that a subordinate cannot plead the illegal command of a superior as an excuse for his illegal act, except in very rare cases specially excepted by statute; but no mention is made of the common-law rule which is in force in America as well as in England, that a ministerial officer is relieved from all responsibility for executing an illegal order which on its face contained nothing to apprise him of its illegality.

An Englishman's ignorance of American geography is so proverbial that it is almost useless to call attention to the fact that William Penn's and Lord Baltimore's lands were not situate in New England, but in Pennsylvania and Maryland respectively. While experience teaches us that it is hopeless to expect the average Englishman to look at a map of the United States, still it remains true that he might occasionally do so with profit.

F. J. G.

The Right of the State to be. By F. M. TAYLOR, PH.D., Professor of History and Politics in Albion College. Ann Arbor, Mich., 1891. — 105 pp.

This little work — a doctor's thesis at the University of Michigan — is an exceedingly valuable essay in political philosophy. Its merit is manifested both in thought and expression. The author's method is exact, his criticism is keen and his general spirit is just. The question which he propounds is this: "By what right does any human organization coercively control the will of individuals? What is the ultimate basal prerogative on which government is built?" To clear the way for his answer, he devotes a preliminary chapter to defining fundamental terms, such as "person," "society," "rights," *etc.;* and in the subsequent chapters — what is not always the case with writers employing this method — he adheres to the definitions. This preliminary chapter reveals the essence of Professor Taylor's theory, which, however, is only definitely propounded after an able criticism of previous or prevalent doctrines. It is in this analysis of the views of others that is to be found the strongest and most suggestive part of the work. The author rejects both the contract theories, which start with individual consent, and those of opposite character, which seem to assign to the individual will no consideration as against the will of some collection of individuals. Between the two sets of doctrine he sets up a theory somewhat as follows: There is an absolute jural order, known perfectly only to absolute intelligence. Of this absolute order, every individual must, by the conditions of his being, form a particular ideal, which ideal he is entitled to enforce as against any other conception of the absolute order. Among a number of persons with this right, final authority "belongs of right to the person or persons who show themselves fittest to

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exercise such authority." But since this fitness belongs "manifestly" to persons acting collectively, the individual will may be coerced by associated men. "The community, therefore, is justified in assuming and exercising final authority in the name of justice."

In spite of the author's ingenious attempts to distinguish his theory from all others, there may be detected some familiar features beneath the disguise of a novel phraseology. "Absolute jural order" is of course Aquinas's *lex æterna*, though Professor Taylor seems to identify it with the *lex naturalis*. It is Locke who tells us that every man has the right to interpret for himself the law of nature. But the determination as to who "show themselves the fittest to exercise authority" is the crucial point. If the decision is reached by taking the views of the individual, we have the essence of the contract theory; if by force, — whether physical or moral, — we have the "might is right" doctrine which the author especially condemns.

Professor Taylor's most conspicuous purpose in the work seems to be to rehabilitate the conception of natural law, and to protest against the absolute power of the state. He feels called upon to rescue from political annihilation on the one hand God, or nature, and on the other hand the individual. His destructive criticism is generally good. In construction I think he fails, and mainly because of his too absolute conception of freedom of the will. While conscious that the individual will is conditioned by its environment, he disregards this fact often in his criticism and altogether in his theory. A man may indeed will to live without the state, but only with effects upon his moral being precisely analogous to those which willing not to eat would have upon his physical being. It is in the group of circumstances which hedge in and absolutely determine in certain respects the will of the normal man, that is to be found the essence of what many thinkers call the sovereign state. It may indeed be as hard to conceive of a literal will as of a literal stomach for the state. But it is not hard to conceive of a set of influences which impose as absolute an obstacle to individual freedom as could any adverse will in its most literal sense. To certain manifestations of this set of influences, whether negatively or positively active, with no violent stretch of metaphor the term "will of the state" may be applied.

Professor's Taylor's début in the field of political philosophy is of the sort to make further essays from his pen very desirable, especially if directed from the historical point of view.

Wm. A. Dunning.

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BOOK NOTES.

UNDER the title of *Epoch Maps* (Longmans, 1891), Professor A. B. Hart presents in convenient form a series of fourteen maps illustrating the political history of the United States from the colonial settlement to the present day. His aim has been "to draw no boundary line for which documentary authority does not exist." For colonial days he gives the situation in 1650, 1700, 1750 and 1763–75; for our independent existence, in 1783, 1801, 1825, 1855, 1861 and 1891. The details of territorial growth, with incidental controversies, are shown in two separate maps, and the history of the slavery question in another. This last is complete but very complex; and the author is to be congratulated on having devised a key to its interpretation that does not, as in case of most historical maps, require a power of discrimination in tints which only an artist or a dyer can hope to attain.

Of the nine essays comprised in Henry Adams's volume of *Historical Essays* (Scribners, 1891) all but one have appeared in some periodical. The novelties are an address on the "Primitive Rights of Women," and "Napoleon I. at St. Domingo," an essay printed in the *Revue Historique*, and almost unknown to American readers. The range of the collection is wide — from a discussion of the origin of marriage, which Mr. Adams attributes to the love of property, to the statement of an abstruse currency problem; but whether the subject is politics or political economy, the workings of Napoleon's genius or the plottings of Fisk and Gould, the author's vigor of statement and lucidity of style command the attention, if they do not always convince the reason of the reader. By the application of the "deadly parallel" to the products of Captain John Smith's imagination, the essayist demolishes one of the few bits of romance that lightened the early history of the country. Napoleon's attempt to reconquer San Domingo is told with greater fulness than in the author's larger work, and this essay, like that on the "Bank of England Restriction," was evidently a side study growing out of the *History*. Four of the essays tell in rather vigorous language the story of Erie Railway management in the hands of Fisk and Gould. And in another the author adduces proof that the issue of legal tenders in 1862 was as criminal as it was unnecessary.

The Sons of the Revolution have authorized the publication of a volume of *Fragments of Revolutionary History*, under the editorship of

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Gaillard Hunt (The Historical Printing Club, Brooklyn). This is a laudable attempt to put into a more permanent shape the manuscript material now widely scattered in private hands, and represents one of the chief functions of such a society as that which puts it forth. More than eighty letters are included in this volume, none of which have been in print before. The most valuable contribution to history is the account of the Yorktown campaign by Col. John Francis Mercer; but the collection in general deals more with topics of antiquarian and social than of political interest. As the first of the collections, this volume makes a very creditable appearance, and it ought to encourage further undertakings.

In the volume entitled *Boston*, contributed by Henry Cabot Lodge to the series of Historic Towns (Longmans), the author, after a brief account of the early settlements, traces the history of the colony under the charter of 1629, pointing out the unconscious fallacy of the Puritans in seeking to combine the mutually destructive principles of a religious test for citizenship on the one hand and of democratic government and free schools on the other. The inevitable failure of the attempt to enforce religious uniformity, and the growing spirit of independence as shown by the defence of the charter and the opposition to the administration of Andros, are then narrated; and after outlining the history of the city to the end of the Federalist period, the author closes with a discussion of its present social and political conditions. Since the narrow limits of the work forbid exhaustive treatment, Mr. Lodge has been careful to select what is of general rather than merely local interest and what typifies the traditions and character of New England.

Mr. Hodgkin's *Theodoric the Goth*, in the Heroes of the Nations series (Putnams), is an admirable treatment of the life of the Ostrogothic warrior and statesman, and presents a graphic picture of the political and social conditions of Italy and the Byzantine Empire in the fifth and sixth centuries. The influence upon the life of Theodoric of the early years spent at the court of Constantinople, the wisdom and impartiality of his rule in Italy, and the relation between the Roman population and the Gothic "guests" are effectively described. To the historical portion of the work, which ends with the overthrow of the Gothic power in Italy by the generals of Justinian, are added some of the poetic legends which cluster about the name of Theodoric in mediæval saga.

From the Clarendon Press comes a reprint of Sir G. C. Lewis's *Essay on the Government of Dependencies*, with introduction and notes by C. P. Lucas. The essay was first published half a century ago. Then England was just setting about the task of remodelling the colonial government of Canada to suit the new conditions created by the revolt

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of the thirteen American colonies and the growth of democracy at home. The author, who later held high office in the two Palmerston ministries, undertook a comparative study of colonization, ancient and modern, for the purpose of ascertaining what were the constitutional relations necessarily existing between a sovereign government and its dependencies, and what advantages and disadvantages resulted to both parties from such relations. He discusses the character of a dependency, the modes of acquiring dependencies, the forms of their government and the reasons for governing territories in this manner. The book is full of suggestive thought. It was a good book when published and it has not been superseded by any later work. Mr. Lucas in his valuable introduction has brought the treatment of the subject down to date.

Professor Émile Boutmy's admirable *Studies in Constitutional Law*, after reaching a second edition in France, are presented to English readers in a translation by E. M. Dicey (Macmillan), with introduction and notes by Professor A. V. Dicey. The original work was reviewed in the POLITICAL SCIENCE QUARTERLY, I, 501. The second edition contains no very important changes. Professor Dicey's brief introduction denotes high appreciation of Mr. Boutmy's work, and the notes which are appended in brackets are designed chiefly to facilitate reference to authorities by the student. The translator has quite faithfully reproduced the thought and spirit of the author, and has at the same time presented them in good English.

Mr. T. G. Kenyon's translation of *Aristotle on the Athenian Constitution* (London, Geo. Bell & Sons) gives this valuable discovery to the non-Hellenic public in a tasty, compact and useful form. The introduction, by the translator, is a most judicious presentation of the facts essential to a proper understanding of the work in its archæological and historical bearings; and the notes form a running commentary which will enable every reader to follow the text intelligently. On every student, the host of uncertain readings and *lacunæ* which are conscientiously indicated by the notes will have a saddening effect. When so much was discovered, the parts that are still missing cause all the deeper regret.

A translation of Professor Gide's *Principles of Political Economy* has been made by E. P. Jacobsen (D. C. Heath & Co., Boston, 1891). The original was reviewed in the POLITICAL SCIENCE QUARTERLY, IV, 548. In its English dress the volume appears to great advantage, as one of the best of the French manuals hitherto translated. The translation on the whole is well done, but it occasionally displays a lack of familiarity with technical terms, as on page 570, where *impôts de répartition et quotité* is translated in a very awkward manner, instead of by

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the technical terms "apportioned" and "percentage" taxes. The lack of English and American illustrations is a drawback, inevitable in a foreign work. Mr. James Bonar has added an introduction and notes, and Professor J. B. Clark gives a few words of American introduction.

Mr. E. C. K. Gonner is responsible for a new edition of Ricardo's *Principles of Political Economy and Taxation* (London, George Bell & Sons, 1891), published in the series of Bohn's Libraries. The edition on which most students have hitherto depended is that of McCulloch, which contained Ricardo's lesser writings as well. But Mr. Gonner is a far more judicious editor than McCulloch. An introductory essay and two appendices attempt to discuss some of the main points in which Ricardo's views have challenged dissent. Mr. Gonner does not spare the critics, and tries hard to preserve a judicial attitude. We have heard so much during the past ten years about the shortcomings of Ricardo that it is well to be reminded of his strong points. The bibliography of the works in Ricardo is very fragmentary, that on wages, interest and taxation being absurdly inadequate.

In the second edition of *Selections Illustrating Economic History* since the Seven Years' War (Cambridge, U.S.A., University Press, 1892), Mr. Benjamin Rand has amplified and somewhat rearranged his material. The first edition was reviewed in this QUARTERLY, III, 702. Among the additional chapters are an account of the Agrarian Legislation of Hardenberg, from Morier; The Commercial Policy of The Restoration, from Levasseur; Recent Changes in Transportation and Production, from Wells; The Liquidations of 1873–1876, from Giffen; and the World's Progress in Trade and Industry, from Neumann Spallat. A number of appendices illustrative of American economic history are added. The bibliography is very fragmentary and omits many works of capital importance, such as the histories of English factory legislation, by Alfred and Tuckett, Brentano on trades unions, the histories of taxation by Tayler, Clamageran, Schanz, *etc.*, the histories of labor by Meyer and Audiganne, the history of postal systems by Hill, Belloc and Stephan, *etc.*, *etc.* Why Proudhon's *Impôt sur la Revenue* (which, by the way, ought to be "*sur le Revenue*") should be singled out for mention (page 553), is incomprehensible. There are dozens of books on the topic, among which Proudhon's is of exceedingly minor importance.

The second edition of John Rae's *Contemporary Socialism* (London, Swan Sonnenschein, 1891), contains many alterations and additions of which the most noteworthy is the hundred-page chapter on "State Socialism." Mr. Rae tries to show that the traditional view of the classical economists as advocates of a narrow social policy is very distorted. "As for the theory of *laissez faire*, it has never in England been

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really anything more than it is now, the plea of alarmed vested interests stealing an unwarranted and I believe an unwelcome shelter under the aegis of economic science" (page 373). There is no doubt that Mr. Rae makes a good case against the German opponents of a supposed "Manchesterismus," but he goes a little too far in imputing to the whole classical school doctrines which are in reality the result of recent economic discussion. Whole pages might be filled with extracts from the minor authors and followers of the classical school which would give a very different impression from that which Mr. Rae seeks to convey. But for the contemptuous extremists of some of the modern schools Mr. Rae's new edition will be exceedingly instructive.

Among the most useful series of recent publications is the *Social Science Library* (the Humbolt Publishing Company), edited by Rev. N. D. P. Bliss, the well-known advocate of Christian socialism. The numbers already published are composed of reprints of the works or essays touching on socialism by John Stuart Mill, Carlyle, Herbert Spencer, William Morris and John Ruskin, together with reprints of the *Fabian Essays* and of Rogers' *Six Centuries of Work and Wages*. Mr. Bliss furnishes an introduction to some of the volumes, and other professed socialists like Mr. Wiltshire and Mr. Owen add notes and commentaries to the *Fabian Essays* and to the works of Herbert Spencer and Ruskin. Although issued in the interests of socialism the series is valuable; the books are attractive in appearance and are issued at a remarkably low price. A number of other volumes are in preparation. The same firm has also recently issued good cheap reprints of Toynbee's *Industrial Revolution* and Marx's *Capital*.

English Social Movements is the title of a work by Robert Archey Woods (Scribners, 1891), which collects in a revised form lectures delivered at Andover Seminary. As head of the Andover House in Boston, Mr. Woods would be predisposed to look with sympathetic eye on all the attempts which make for social reform. His account of the labor movement, recent socialism, university settlements and university extension, the social work of the church, charity and philanthropy is sane and straightforward; and although the reader may miss profound analysis, he will be sure to find interesting information brought down to the most recent date. It is a good but unpretentious book.

For those interested in the history of European finance two works of considerable value have recently appeared. The *Geschichte der Preussischen Staats-Besteuerung*, 1806–1816, by Karl Mamroth (Duncker und Humblot, Leipzig, 1890), is the first volume of a detailed history of Prussian taxation in the nineteenth century, based entirely on original and contemporary documents. It seems as if the author might have

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somewhat condensed his conclusions; for if each decade is to take a volume of 800 pages, the prospect is rather appalling. The work will nevertheless be invaluable to all students of taxation, dealing as it does with one of the most momentous epochs of German history. A far less detailed work is that of Bouchard, *Système Financier de l'Ancienne Monarchie* (Guillaumin, 1891). In the matter of public revenue Bouchard's book does not attempt to add anything to the researches of Clamageran and Vuitry. It will be found to be simply an agreeable and interesting compendium of more or less well-known facts. But in those portions of the work dealing with expenditures and with control of the finances, a great mass of comparatively new material is put together in convenient shape. The book may be read profitably as an introduction to the more detailed works.

In Cucheval-Clarigny's *Les Finances de la France de 1870 à 1891* (Paris, Perrin, 1891) no attempt is made to give a real financial history of the country in the sense of analyzing the causes and the influence of governmental action on the general social economy. The point of view is rather that of an administrative or financial official. Thus we have a very valuable account of the fiscal measures of the last twenty years, with a description of the governmental and parliamentary discussions on the various schemes — budget, public debt, revenue and expenditure. There is little criticism of theory and few projects of reform. But the book will be welcome to all those who desire to comprehend the actual condition of the French financial equilibrium.

The Insane in Foreign Countries, by William P. Letchworth (Putnams, 1891), is in a measure a complement to the work of Dr. Hack Tuke on the insane in the United States and Canada. Mr. Letchworth was admirably equipped by experience for his investigation, and his book is one which has general interest, as well as special and permanent value. He personally inspected the principal public asylums of Great Britain and the continent, and his book is a careful record of what he saw and heard there. The conclusions which he reached are clearly the result of unbiassed observation, and are expressed with a reassuring degree of cautiousness. In the much-lauded Gheel colony, he finds little that Americans can profitably imitate. The English asylums in general are accorded high praise.

Mr. F. A. Hibbert's Thirlwall Dissertation on *The Craft Guilds of Shrewsbury* has recently been published by the Cambridge University Press (1891). It is welcome as one of the first of those local studies which are so urgently called for by English economic history. Mr. Hibbert's general sketch of guild development follows the ordinary authorities; and on the crucial point of the effect of Edward VI's legislation he unfortunately emphasizes their mistakes. He is quite

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unaware that in Edward's statute the craft societies were the subject of a special exemption. But he is independent enough to recognize that the life of the craft companies was quite continuous throughout the sixteenth century; and being rather puzzled how to reconcile this with the ordinary authorities, he takes refuge, with Dr. Cunningham, under the term "reorganization." For later centuries the essay is more useful, as it is based almost entirely on Shrewsbury documents which are not very accessible in the publications of archæological societies. An appendix of a half-dozen or more typical early documents, printed in their entirety, instead of the meagre list of authorities (including Longfellow and Thackeray and other recondite writers), would have added greatly to the value of the book.

The History of Commerce in Europe, by H. de B. Gibbins (Macmillan, 1891), may serve for a time, in default of anything more satisfactory, for the purpose for which it is intended, — as a class-book for schools preparing for commercial examinations. Like most school-books, it suffers from the grave defect of being crammed full of bare facts, big and little. Like many school-books, again, its author occasionally remembers that the work is "elementary," and proceeds to talk down to the boys for a line or so. There is also a good deal of rather cheap radical or democratic sarcasm that might advantageously be dispensed with; as where we are told that "the heroes of chivalry could not go about wasting their time in tournaments and battles without spending a great deal of wealth; and as they never did anything to obtain that wealth, their miserable dependents had to support them." The quite unnecessary addition of "as they are called" after the mention of "the upper classes" reminds one of the old story of the preacher who spoke of "the so-called nineteenth century." Still the work seems to be a trustworthy compilation, with very few slips: though what the ordinary boy will understand by the statement that "the word feudalism is not found in literature till the time of Charles the Fat" is amusing to imagine.

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